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ABSTRACT

The National Collegiate Athletic Association (NCAA) recently promulgated rules that make athletes' initial eligibility conditional upon the achievement of certain scores on college entrance examinations and completion of a specified high school curriculum with a minimum grade point average of 2.0 on a 4.0 scale. The changes were instituted to "assert the supremacy of academic values" in collegiate sports and to "preserve the integrity of the NCAA and of our [college] institutions." Some presidents of historically black colleges opposed the rules, claiming that they were "patently racist" and a "disservice to Blacks and other Americans who aspire to attain a higher education by participating in intercollegiate athletics." This article explores the serious factual, legal, and policy questions presented by the NCAA's action. It discusses the process in which the new initial eligibility changes were formulated; the specific rule changes that were made; the reaction to those changes; the potential impact they may have; the legal issues presented by the changes; and the future of integrity in college athletics. It is concluded that the adoption of the new requirements was a fine gesture in spirit, but poorly executed and inadequately reasoned, and further considerations are needed. (JD)

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THE NEW NCAA RULES OF THE GAME: ACADEMIC INTEGRITY OR RACISM?

LINDA S. GREENE*

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I. INTRODUCTION

A recent dispute within the National Collegiate Athletic Association (hereinafter NCAA)[1] may change both the image and complexion

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1. [The] National Collegiate Athletic Association [hereinafter, "NCAA"] is a private non-profit association organized in 1905. [The] NCAA consists of approximately 900 members. Membership is open to four-year institutions which meet certain academic standards. Allied and Associate membership is open to athletic conferences, associations and other groups interested in intercollegiate athletics . . . . [The] NCAA operates pursuant to a Constitution and Bylaws adopted by the membership and subject to amendment, . . . by the membership at annual conventions. When the annual convention is not in session, policy is established and directed by the NCAA Council of 22 members elected by the entire membership at the annual convention. [The] NCAA has a professional staff located at its headquarters in Shawnee Mission, Kansas. Some 80 employees execute NCAA policy under the supervision of [an executive director].
Board of Regents of the Univ. of Okla. v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982), *aff'd in part, rev'd in part*, 707 F.2d 1147 (10th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3303 (U.S. Oct. 18, 1983)(No. 83-271). The NCAA's Constitution, bylaws, and procedures are set out at length in its manual, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1982-1983 NCAA MANUAL [hereinafter

of college sports. The NCAA recently promulgated rules,[3] which condition initial eligibility upon the achievement of certain scores on college entrance exams[5] and the completion of a specified high school curriculum with a minimum grade point average of 2.0 on a 4.0 scale.[4] According to the proponents of the eligibility changes, the American Council on Education (hereinafter also ACE)[5] and the Ad Hoc Committee on the Problems of Major Intercollegiate Athletic Programs (hereinafter Ad Hoc Committee),[6] the purpose of the changes was to

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cited as NCAA MANUAL].

The revenues and expenses of NCAA-governed activity are approaching the $1,000,000,000 mark. In 1981, NCAA member institutions had aggregate estimated revenues from NCAA-governed sports programs of $718,000,000. Aggregate total revenues in the same year were estimated at approximately $770,000,000. Raiborn, *Revenues and Expenses of Intercollegiate Athletic Programs: Analysis of Financial Trends and Relationships 1978-1981*, National Collegiate Athletic Association Research Grant (1982).

2. At the NCAA convention held in San Diego, California (Jan. 10-12, 1981), the NCAA membership considered various proposals to amend its bylaws. Those proposals that received a majority vote of the voting membership present at the convention became bylaws of the NCAA pursuant to article VI, § 4 of the NCAA Constitution. *See* NCAA MANUAL, *supra* note 1, at 41. For a summary of the legislation passed at the San Diego convention, see Letter from NCAA to NCAA Members (Jan. 14, 1983) (entitled "Significant Legislation Passed at 1983 NCAA Convention") [hereinafter cited as Letter from NCAA to NCAA Members].

3. This bylaw vote amended the 1982 NCAA bylaw 5-1-(j), which addressed freshman eligibility requirements. *See* Letter from NCAA to NCAA Members, *supra* note 2. Prior to amendment, freshman eligibility did not depend upon the achievement of a minimum college entrance examination test score. *See* NCAA MANUAL, *supra* note 1, at 74.

4. *See* Letter from NCAA to NCAA Members, *supra* note 2.

5. See *infra* notes 12-15 and accompanying text for a description of the ACE.

6. The Ad Hoc Committee proposed that the NCAA membership adopt the minimum eligibility requirement. The Ad Hoc Committee's formation, membership, and role in the adoption of those requirements is discussed herein. *See infra* text accompanying notes 22-45.

The Ad Hoc Committee was not alone in its effort to strengthen minimum NCAA freshman eligibility requirements. In August 1982, the NCAA Council created a 16 member committee to "examine in detail the serious problems affecting college athletics today." Vance, *NCAA Names Independent Panel to Find 'Practical Solutions' to Sports Problems*, Chronicle of Higher Education, Aug. 11, 1982, at 1, col. 3. According to John O. Schaefer, former president of the University of Arizona and executive director of the Committee, " '[t]he basic issue is how to maintain the integrity of the universities . . . .' " *Id.* at 1, col. 2. In May 1982, representatives from prominent institutions of higher education, the Big Eight Conference, and the College Football Association (an organization of 61 major football powers) met in Brunswick, Georgia to discuss tougher academic standards for students on athletic scholarships. Crowl, *Sports Figures Urge Higher Entrance Standards for Students Who Get Athletic Scholarships*, Chronicle of Higher Education, June 2, 1982, at 1, col. 2. They agreed to press for a core curriculum and minimum college entrance examination requirements at the 1983 NCAA convention. *Id.* at 1, col. 1.

In her doctoral dissertation, Ann Mayo reviewed the literature concerning aca-

"assert the supremacy of academic values" in collegiate sports[7] and to "preserve the integrity of the NCAA and of our [college] institutions."[8] However, some presidents of historically black colleges[9] bitterly opposed the rules. They claimed that the rules are "patently racist"[10] and "a disservice to blacks and other Americans who aspire to attain a higher education by participating in intercollegiate athletics."[11]

This article explores the serious factual, legal, and policy questions presented by the NCAA's action. In particular, this article will discuss the following: The process in which the NCAA new initial eligibility changes were formulated; the specific rule changes that were made; the reaction to those changes; the potential impact the eligibility changes may have; the legal issues presented by the changes; and the future of

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demic performance and intercollegiate athletics. Her review revealed 40 years of research on the academic potential and success of college athletes. A. Mayo, The Relationship Between Athletic Participation and the Academic Aptitude, Achievement and Progress of Male and Female Athletes in Revenue and Non-Revenue Producing Sports at the Ohio State University 22-31 (1982) (unpublished manuscript). She also reported that well-publicized athletic scandals during the 1979-1980 academic year generated a renewed interest in the academic integrity of higher educational institutions and their athletic programs. *Id.* at 31. In 1980, the ACE, the NCAA, and the American Association of College Registrars and Admissions Officers called for higher academic standards and greater diligence in enforcing eligibility standards in order to prevent academic fraud. *Id.* at 32 (citing *Text of 'Joint Statement on Academic Integrity,'* Chronicle of Higher Education, July 7, 1980, at 6, col. 5). Mayo reports a round of response to these calls for reform from college officials and college presidents. *Id.* at 32-33.

7. Letter from Derek C. Bok, President of Harvard University and Chairman of the Ad Hoc Committee, and J. W. Peltason, President of the ACE, to NCAA Division I members (undated).

8. *Id.*

9. The historically black colleges who are members of Division I, NCAA are: Alabama State University, Montgomery, Alabama; Alcorn State College, Lorman, Mississippi; Bethune Cookman, Daytona Beach, Florida; Delaware State College, Dover, Delaware; Florida A & M University, Tallahassee, Florida; Grambling State University, Grambling, Louisiana; Howard University, Washington, D.C.; Jackson State University, Jackson, Mississippi; Mississippi Valley State University, Itta Bena, Mississippi; North Carolina A & T, Greensboro, North Carolina; South Carolina State College, Rangeburg, South Carolina; Southern University, Baton Rouge, Louisiana; and Texas Southern University, Houston, Texas. Telephone interview with Derrick Humphries, president of Tennessee State University, Nashville, Tennessee (Oct. 31, 1983).

10. Crowl, *NCAA Votes Stiffer Academic Requirements for Participants in Intercollegiate Sports*, Chronicle of Higher Education, Jan. 19, 1983, at 1, col. 4; White, *N.C.A.A.'s High Aims Turn Into Rights Controversy*, N.Y. Times, Jan. 16, 1983, at 4S, cols. 1-5; White, *Black Colleges Threaten to Leave N.C.A.A. Over Academic Policy*, N.Y. Times, Jan. 13, 1983, at A1, cols. 1-2.

11. Farrell, 2 *Civil-Rights Leaders Denounce NCAA's New Academic Standards*, Chronicle of Higher Education, Jan. 26, 1983, at 18, col. 2 (quoting Jesse Stone, president of Southern University, Baton Rouge, Louisiana); White, *Black Colleges Threaten to Leave N.C.A.A. Over Academic Policy*, N.Y. Times, Jan. 13, 1983, at B16, col. 4.

academic integrity in college athletics.

It is concluded that the adoption of the new initial eligibility requirements was a fine gesture in spirit, but was poorly executed and inadequately reasoned. Moreover, it is suggested that a more serious and comprehensive effort must be made to reform college sports if academic integrity is to be restored to America's college campuses. The legal and educational policy questions raised by the new rules, as well as the potential impact of the rules on the access by blacks to sports and education, suggest that the NCAA and ACE should return to the chalk room to reconsider their game plan for academic integrity.

II. The New Rules

A. *The American Council on Education and the Movement for Academic Integrity in Collegiate Sports*

The American Council on Education was founded in 1918[12] "to advance education . . . through comprehensive, voluntary, and cooperative action on the part of American educational associations, organizations, and institutions . . . [and to] serve education in such undertakings as may be required and approved from year to year and from generation to generation for the common welfare."[13] It is "the principal . . . coordinating body for post-secondary education" and is comprised of 1600 colleges and universities.[14] The current chairman of the executive committee of the ACE is Derek C. Bok, president of Harvard University, and the president of the ACE is J. W. Peltason, formerly president of the University of Illinois.[15]

Whatever its other motivations, the magnitude of intercollegiate

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12. "The American Council on Education, founded in 1918 and composed of institutions of higher education and national and regional education associations, is the nation's major coordinating body for postsecondary education. Through voluntary and cooperative action, the council provides comprehensive leadership for improving education standards, policies, procedures, and services." AMERICAN COUNCIL ON EDUCATION, 1982 MEMBERS GUIDE inside front cover [hereinafter cited as MEMBERS GUIDE].

13. *Id.* at 5 (quoting ACE Constitution art. II).

14. *Id.*

15. *Id.* at 41.

> The Council operates through a Board of Directors, its chair, a president, advisory commissions, committees, task forces, an executive committee, and a Washington-based staff.
>
> The 37-member Board of Directors reflects the diversity of American higher education in the Council's membership. Board members normally are selected to serve three-year terms; officers of the board are elected each year at the ACE annual meeting. The Board sets policy for the operations and directions of the Council and, with the assistance of the president and various advisory bodies, makes policy recommendations to the entire community of postsecondary education and to the federal government.

Id. at 5-6.

athletic participation[16] as well as intercollegiate athletic revenue[17] would require that the ACE express an interest in intercollegiate athletics. This generalized interest has given rise to two ACE committees that focus on collegiate athletic policy—the Presidents' Committee on Collegiate Athletics[18] (hereinafter Presidents' Committee) and the Ad Hoc Committee. The Presidents' Committee in 1983 was composed of thirteen college presidents[19] and one president emeritus.[20] The Presidents' Committee meets biannually and, among other things, provides information to college presidents on issues that will be presented at the annual NCAA convention.[21]

The other, perhaps more powerful and certainly more controversial, ACE committee addressing athletic matters is the Ad Hoc Committee. This Committee was formed in 1982 "to give campus executives a new forum to deal with college athletics, which have been tainted recently by charges of recruitment violation, illegal payments to student-athletes, tampering with academic records, and other problems."[22] The Ad Hoc Committee, chaired by Harvard University president Derek Bok,[23] is comprised of forty college presidents, the ACE's president and executive vice-president, and a representative from the Association of American Universities.[24] At the organizational meeting of the Committee, held in August 1982, ACE president Peltason summed up the rationale for college president leadership in intercollegiate athletic policy:

> Football and basketball programs at some major colleges and universities are in trouble . . . . Recent charges involving illegal payments to student athletes, transcript manipulations, and other alleged abuses are injuring the reputations of some of the nation's finest institutions.
>
> College and university presidents consider this a serious problem, . . . a problem we must correct and correct quickly. The fact that 12 campus chief executives felt compelled to meet on a Saturday in the middle of summer—a group of presidents representing

16. According to the NCAA, during the 1980-1981 academic year 169,477 men and 71,768 women participated in NCAA-governed sports activities. National Collegiate Athletic Association Participation Study (Dec. 28, 1981).

17. *See* Raiborn, *supra* note 1, at 22.

18. MEMBERS GUIDE, *supra* note 12, at 49.

19. *Id.*

20. *Id.*

21. Memorandum from Robert H. Atwell, Vice President of the ACE, on behalf of the Presidents' Committee on Collegiate Athletics to Chief Executive Officers of ACE Member Institutions (Dec. 22, 1982).

22. B. Aaron, Public Affairs Director of the ACE, Press Release, at 1 (Nov. 30, 1982) (describing proposals agreed upon by the Ad Hoc Committee).

23. *Id.*

24. List supplied by B. Aaron, Public Affairs Director of the ACE (Feb. 28, 1983).

> sports power from the Big 10, PAC 10, Ivy League Atlantic Coast Conference, and elsewhere—is a clear signal that we see this as a presidential problem and are ready to act.[25]

The twelve campus chief executives who met initially set a comprehensive, long-range agenda,[26] but early on decided to focus on the establishment of minimum academic standards for participation in intercollegiate athletics.[27]

Three initial proposals, "toughening initial eligibility and academic-progress rules for student athletes,"[28] emerged in outline form after twenty members of the Ad Hoc Committee met on September 26, 1982. The Ad Hoc Committee decided to introduce the following proposals to the NCAA January 1983 convention:

> 1. An initial eligibility standard for Division I intercollegiate athletics commencing in 1986 which would combine a minimum grade-point average in a core curriculum of high-school courses with minimum standardized test scores.
>
> . . . .
>
> 2. To remain eligible for varsity competition after the freshman year, a student-athlete would—in addition to meeting all existing NCAA requirements—have to make satisfactory progress toward a baccalaureate degree and be in good academic standing, which would have to be certified by appropriate academic authorities.[29]

After twenty-two members of the Ad Hoc Committee met on November 29, 1982,[30] the Ad Hoc Committee's proposals were more con-

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25. B. Aaron, Public Affairs Director of the ACE, Press Release, at 2 (Aug. 10, 1982) (describing Aug. 7, 1982 meeting of the Ad Hoc Committee). The August 7 meeting was attended by: Edward T. Foote II, president of the University of Miami; William Friday, president of the University of North Carolina; William P. Gerberding, president of the University of Washington; M. Cecil Mackey, president of Michigan State University; Reverend J. Donald Monan, S.J., president of Boston College; John Oswald, president of Pennsylvania State University; Ronald W. Roskens, president of the University of Nebraska; John W. Ryan, president of Indiana University; Bernard F. Sliger, president of Florida State University; Howard Swearer, president of Brown University; and Charles E. Young, chancellor of the University of California at Los Angeles. The meeting was cochaired by Derek Bok, president of Harvard University, and J. W. Peltason, president of the ACE. *Id.* at 1-2.

26. *Id.* at 1. The Ad Hoc Committee expected to deal with recruitment practices and eligibility issues. The Ad Hoc Committee also expressed an interest in topics such as employment conditions of coaches, financial aid, and the NCAA enforcement machinery. B. Aaron, Public Affairs Director of the ACE, Press Release (Sept. 26, 1982) (describing Sept. 26, 1982 meeting of the Ad Hoc Committee).

27. B. Aaron, Public Affairs Director of the ACE, Press Release (Sept. 26, 1982) (describing Sept. 26, 1982 meeting of the Ad Hoc Committee).

28. *Id.* at 1.

29. *Id.* at 1-2.

30. B. Aaron, Public Affairs Director of the ACE, Press Release (Nov. 30, 1982) (describing Nov. 29, 1982 meeting of the Ad Hoc Committee). According to Mr.

crete. The Ad Hoc Committee decided to seek NCAA rule changes, effective August 1986, which would make initial eligibility more difficult for high school seniors to attain. According to the changes,

> [n]o high school graduate would be eligible for competition unless the student athlete was graduated with at least a 2.0 grade point average (on a 4.0 scale) in a core curriculum of 11 academic courses including at least three in English, two in mathematics, two in social science, and two in natural or physical science (including at least one laboratory class, if offered by the high school) and a 700 combined score on the Scholastic Aptitude Test or the American College Testing Service equivalent.[31]

The Ad Hoc Committee also agreed to propose a "satisfactory progress rule" requiring that a minimum number of credit hours be completed each year in a specific bachelor degree program and that the student be in good academic standing.[32]

In addition to developing specific proposals, members and representatives of the Ad Hoc Committee also began to articulate rationales for the changes. In early November 1982, Derek Bok and J. W. Peltason wrote to the presidents of Division I institutions to inform them of the Ad Hoc Committee's activities.[33] According to Bok and Peltason, the purpose of the Ad Hoc Committee is

> to discuss ways in which chief executive officers can bring concerted leadership to bear on the many problems which beset . . . major athletic programs. An underlying theme [behind the Ad Hoc Com-

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Aaron, the following persons attended the November 29, 1982 meeting: Derek Bok (chairman), president of Harvard University; Fred Davison, president of the University of Georgia; Glen Driscoll, president of the University of Toledo; Edward T. Foote II, president of the University of Miami; E. K. Fretwell, Jr., chancellor of the University of North Carolina at Charlotte; William Friday, president of the University System of North Carolina; William P. Gerberding, president of the University of Washington; Father Timothy Healy, president of Georgetown University; The Reverend Theodore M. Hesburgh, C.S.C., president of the University of Notre Dame; Edward H. Jenning, president of Ohio State University; Richard G. Kandini, president of Indiana State University; M. Cecil Mackey, president of Michigan State University; The Reverend J. Donald Monan, S.J., president of Boston College; Wesley Posvar, chancellor of the University of Pittsburgh; J. C. Powell, president of Eastern Kentucky University; Harold Robinson, chancellor of Western Carolina University; Ronald W. Roskens, president of the University of Nebraska; John W. Ryan, president of Indiana University; Otis A. Singletary, president of the University of Kentucky; Bernard F. Sliger, president of Florida State University; Charles E. Young, chancellor of the University of California, Los Angeles; and James H. Wharton, chancellor of Louisiana State University. *Id.*

31. *Id.*

32. *Id.* at 2.

33. Letter from Derek C. Bok, President of Harvard University and Chairman of the Ad Hoc Committee, and J. W. Peltason, President of the ACE, to NCAA Division I members (undated).

> mittee] discussion is that presidential leadership is needed to bring about the changes that are required [in order] to reassert the view that participants in intercollegiate athletics are students first and athletes second.[34]

The decision to focus on academic issues was natural, according to Bok and Peltason:

> [A]s educators, these are the topics where we have the greatest expertise and for which we have a clear and inescapable responsibility to assert the supremacy of academic values. We are concerned that in the zeal to produce winning teams, athletic eligibility has often been placed ahead of academic qualification. The concern with eligibility also results in some athletes being counseled to take courses which may not satisfy a degree program.[35]

The letter further explained that

> the present eligibility rule, which requires a 2.0 high school grade point average, extends eligibility to a large number of athletes who have little or no chance of successfully completing a course of study in [college] institutions. Moreover, the 2.0 rule is believed by many to encourage academically marginal student athletes to take high school courses they can pass rather than those which might better qualify them for collegiate work.[36]

During a subsequent meeting, several participating presidents commented on the objectives and motivations of the Ad Hoc Committee. The effort to raise initial eligibility requirements was thought to be important as an incentive to high school academic achievement.[37] Another concern that was expressed was the proper role of the university in the educational process. One president felt that universities should devote themselves to higher education rather than remediation. He stated that "[h]igh school sports have become the carrot that drives students with athletic ability to academic achievement so that our campuses are not turned into academic salvage operations."[38] Another president theorized that if the high schools improved course offerings and established sound graduation criteria, "higher standards and improved quality in higher education are certain to follow . . . ."[39] But beneath these statements lurked another more pressing objective: repair of damage to the credibility of universities and colleges due to repeated sports

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34. *Id.*
35. *Id.*
36. *Id.*
37. B. Aaron, Public Affairs Director of the ACE, Press Release (Nov. 30, 1982) (quoting Fred Davison, president of the University of Georgia).
38. *Id.* (quoting Fred Davison).
39. *Id.* (quoting Richard G. Landini, president of Indiana State University).

scandals.[40]

A month before the 1983 NCAA convention, Peltason and Bok wrote college and university presidents summarizing the work of the Ad Hoc Committee.[41] The letters described the two proposals, which were by then motions, as they would be presented at the 1983 NCAA convention. Motion 48 concerned initial academic eligibility for Division I sports[42] and stated:

> This motion is limited to division I and beginning August 1, 1986 would require a 2.00 high school grade point average in a core curriculum of 11 academic courses (9 of which are specified) *and* a 700 combined verbal and math SAT score or a 15 composite ACT score . . . . A student-athlete failing to meet the initial eligibility standard could be admitted to the institution and have four seasons of eligibility if he or she met the satisfactory progress standards in the first year.[43]

Motion 56, the "satisfactory progress" proposal, stated that

> the presently-required minimum credit hours (24 semester hours or the quarter-hour equalivant [sic] in the year preceding competition) be in a specific baccalaureate degree program. The intent of this proposal is to increase the graduation rates of student-athletes in the high pressure sports and to assure that student-athletes are not being counseled primarily into courses designed to safeguard their eligibil-

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40. *Id.* "The Ad Hoc Committee was formed in August to give campus chief executives a new forum to deal with college athletics, which have been tainted recently by charges of recruitment violations, illegal payments to student-athletes, tampering with academic records, and other problems." *Id.* at 1.

There is no doubt that scandal played an important role in the formation of the Ad Hoc Committee. According to the NCAA, there were 18 universities on NCAA probation in 1982. Vance, *Deterring Cheaters in College Sports: Tougher Penalties vs. Better Policing*, Chronicle of Higher Education, Oct. 20, 1982, at 17, cols. 3-5. They included: Arizona State University (football); Arkansas State University (basketball); University of California at Los Angeles (basketball); University of California at Santa Barbara (basketball); California State Polytechnic at Pomona (basketball, cross-country, football); University of Colorado (football); University of Miami (football); University of Oregon (football); Saint Louis University (basketball); University of South Florida (basketball); University of Southern California (football); Southern Methodist University (football); Texas Christian University (basketball); University of Texas at Austin (football); Wichita State University (basketball); and University of Wisconsin at Madison (football). *Id.* Eight of these 18 schools were on probation for academic-related offenses such as crediting athletes with unearned grades and utilizing fraudulent transcripts. *Id.*

41. Letter from Derek Bok, President of Harvard University and Chairman of the Ad Hoc Committee, and J. W. Peltason, President of the ACE, to Paul Olum, Acting President of the University of Oregon (Dec. 10, 1982).

42. *Id.*

43. Letter from Robert H. Atwell, Vice President of the ACE, on behalf of the Presidents' Committee on Collegiate Athletics to Chief Executive Officers of ACE Member Institutions, at 4 (Dec. 22, 1982).

> ity, with little or no concern for their progress toward graduation. There will be a divided vote in division I and II meaning that it could be adopted by either or both divisions.[44]

These motions were presented to the NCAA convention held in San Diego, California on January 10-12, 1983.[45] As adopted, they would amend portions of article V of the NCAA bylaws concerning athletic eligibility.[46] Both proposals passed the NCAA,[47] after almost a full day of heated discussion[48] and vehement criticism.[49] That criticism, and that which occurred in the aftermath of the NCAA convention, is discussed next.

B. *The New Rules: Academic Integrity or Racism?*

1. Introduction

The Ad Hoc Committee's proposals, ostensibly based on a desire for academic integrity in college sport, were met with not only extensive publicity[50] and praise,[51] but scorn as well. The scorn seemed to settle primarily upon two concerns, one procedural and the other substantive. The procedural concern was the lack of representation of historically black institutions and black representatives on the Ad Hoc

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44. *Id.*

45. *See* Letter from NCAA to NCAA Members, *supra* note 2.

46. The initial eligibility proposals were intended to amend article V, § 1-(j) of the NCAA bylaws. NCAA MANUAL, *supra* note 1, at 74. The satisfactory progress proposals were intended to amend article V, § 1-(j)-(6)-(iii) of the NCAA bylaws. *Id.* at 75. *See* Letter from Derek Bok, President of Harvard University and Chairman of the Ad Hoc Committee, and J. W. Peltason, President of the ACE, to Chief Executive Officers of NCAA Division I Institutions (Dec. 28, 1982).

47. *See* Letter from NCAA to NCAA Members, *supra* note 2.

48. *Furor in San Diego: A Testing Problem for the NCAA*, Sports Illustrated, Feb. 21, 1983, at 9.

49. *Id. See also* Ransom, *Black Colleges Blast Proposition 48*, National Leader, Feb. 3, 1983, at 28, col. 1; Farrell, *2 Civil-Rights Leaders Denounce NCAA's New Academic Standards*, Chronicle of Higher Education, Jan. 26, 1983, at 1, cols. 1-2; Crowl, *NCAA Votes Stiffer Academic Requirements for Participants in Intercollegiate Sports*, Chronicle of Higher Education, Jan. 19, 1983, at 1, col. 3 (black college presidents call action "patently racist"); White, *N.C.A.A.'s High Aims Turn Into Rights Controversy*, N.Y. Times, Jan. 16, 1983, at 4S, cols. 4-5; *Black Colleges Threaten to Leave N.C.A.A. Over Academic Policy*, N.Y. Times, Jan. 13, 1983, at 1, cols. 1-2.

50. *Id.* The rule changes were also the subject of two public television shows broadcast on Oregon's Public Broadcasting System. *See Front Street Weekly*, Oregon Public Broadcasting System (Mar. 31, Apr. 7, 1983).

51. *Id. See* Lo Schiavo, *Restoring, and Controlling, a College Sport*, N.Y. Times, July 10, 1983, at 20Y, cols. 1-5; Farrell, *A Critic Sees His Protest Against Racisim in Sports Vindicated After 20 Years*, Chronicle of Higher Education, Jan. 26, 1983, at 17, cols. 1-3 (discussing praise of sports sociologist Dr. Harry Edwards of the University of California, Berkeley).

Committee that formulated the new initial eligibility rules.[52] The substantive concern centered on the appropriateness of the minimum entrance examination test score as a prerequisite to freshman eligibility.[53] Jesse Stone, a former Louisiana Supreme Court Judge and former dean of the Southern Law School in Baton Rouge, Louisiana, summed up the most critical reaction to the new standards. According to Stone, the new standards are "patently racist."[54]

2. The Exclusionary Process

The decision of the NCAA to adopt the new initial eligibility standards affected a number of different groups, all of which were excluded from the rule development process in the Ad Hoc Committee. The groups affected include blacks, who have historically been disadvantaged by standardized testing, the historically black colleges, which have always disproportionately educated young black people as well as afforded them a quality athletic experience, secondary educational institutions who may be affected by the NCAA core curriculum requirements, testing services that design and administer the tests which are

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52. Ransom, *Black Colleges Blast Proposition 48*, National Leader, Feb. 3, 1983, at 20, col. 1; Crowl, *2 Civil-Rights Leaders Denounce NCAA's New Academic Standards*, Chronicle of Higher Education, Jan. 26, 1983, at 18, col. 3; White, *N.C.A.A.'s High Aims Turn Into Rights Controversy*, N.Y. Times, Jan. 16, 1983, at 4S, col. 2; White, *Black Colleges Threaten to Leave N.C.A.A. Over Academic Policy*, N.Y. Times, Jan. 13, 1983, at 16, col. 4. For a detailed discussion of these concerns, see *infra* text accompanying notes 55-73. The Ad Hoc Committee took the concern over lack of representation seriously when it reconvened after the NCAA convention, February 25, 1983, to "map strategy for continued leadership on collegiate-sports issues." B. Aaron, Public Affairs Director of the ACE, Press Release, at 1 (Feb. 28, 1983) (describing Feb. 25, 1983 meeting of the ACE Ad Hoc Committee). At that meeting, a resolution was approved authorizing a joint meeting with representatives of black colleges concerned about new NCAA rules. *Id.* The text of the resolution stated:

> The committee reaffirms its commitment to strengthening academic standards for student athletes and indicates its willingness to consider options to improve those standards. The committee also instructs the ACE staff to seek ways to consult with university presidents who have expressed concerns about some aspects of Rule 48, especially black college presdents.
>
> To this end, . . . a meeting between some members of the ACE committee and some representatives of historically black colleges will be arranged in the spring . . . .

Id. at 2.

53. Ransom, *Black Colleges Blast Proposition 48*, National Leader, Feb. 3, 1983, at 28, col. 2; Vance, *Testing-Service Head Hits NCAA's Academic Rules*, Chronicle of Higher Education, Feb. 2, 1983, at 1, col. 2; Farrell, *2 Civil-Rights Leaders Denounce NCAA's New Academic Standards*, Chronicle of Higher Education, Jan. 26, 1983, at 1, col. 3; *N.C.A.A. Assailed By Jesse Jackson*, N.Y. Times, Jan. 20, 1983, at D25, col. 5. For a more extensive discussion of these issues, see *infra* text accompanying notes 96-100.

54. *See supra* note 10.

now used for determining academic eligibility, and potential collegiate athletes, including those who may be excluded from competition as well as those who are included but whose competitive and associative opportunities are lessened as a result of the new rules. While each of these groups might be expected to have viewpoints or opinions on the new eligibility rules,[55] three of the groups seem most profoundly affected by the change: blacks, historically black colleges, and secondary educational institutions.

a) *The Exclusion of Blacks and Representatives of the Historically Black Colleges*

There seems to be no dispute that the Ad Hoc Committee had no black representation while it formulated the proposals for the NCAA convention.[56] Representatives of both the ACE and the NCAA expressed surprise that the issue had become racially infused,[57] but there seems to be evidence that they were or should have been forewarned.

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55. It is not necessary to impugn the integrity of the Ad Hoc Committee to suggest that the interests and viewpoints of its members might diverge from those held by important groups excluded from its process. For example, though the members of the Ad Hoc Committee were legitimately concerned with the academic integrity of the university generally, they also may have desired a quick-fix or an attention getting solution to a severe, public relations problem. Other groups might see their interests seriously compromised by such hastily chosen solutions. For instance, black students, as well as other students disadvantaged by the exclusionary solution, might emphasize access to the college athletic and educational experience. The traditionally black colleges might view their potential student constituency narrowed as a result of NCAA policy precluding an athletic experience. Representatives from secondary educational institutions might emphasize the need for greater coordination between colleges and universities, the NCAA, and secondary educational institutions in the establishment of educational policy. Testing services, designing and administering college entrance examinations, might offer advice on the suitability of their devices for the NCAA's purposes. They might also offer their prediction, experience, and expertise to the Ad Hoc Committee and the NCAA. Finally, students excluded *and* included under the proposed rules might emphasize the qualitative difference in their athletic and social experiences due to the denial of associative opportunities.

Many will argue, however, that none of these groups, under existing rules, possess a right to participate in the rule formulation process. While it may be conceded that their interests are worthy, it will be concluded that their participation is not. On the other hand, one may plausibly conclude that the results of a materially unrepresentative process deserve little deference. Not only have the excluded been devalued, but their interests have been disregarded.

56. Ransom, *Black Colleges Blast Proposition 48*, National Leader, Feb. 3, 1983, at 28, col. 3; *2 Civil-Rights Leaders Denounce NCAA's New Academic Standards*, Chronicle of Higher Education, Jan. 26, 1983, at 18, col. 3; White, *N.C.A.A.'s High Aims Turn Into Rights Controversy*, N.Y. Times, Jan. 16, 1983, at 4S, cols. 1-5; Telephone interview with Jesse Stone, President of Southern University, Baton Rouge, Louisiana (Feb. 17, 1983).

57. White, *N.C.A.A.'s High Aims Turn Into Rights Controversy*, N.Y. Times, Jan. 16, 1983, at 4S, cols. 2-4.

Jesse Stone stated in a recent interview that he first learned of the Ad Hoc Committee proposals a "couple of months prior to the NCAA convention."[58] When he and other presidents of the historically black colleges learned of the proposed changes, they complained to the NCAA Council and the ACE.[59] Stone stated that the ACE made no commitment to change the proposals, but it did send a representative to the convention of black colleges to explain the proposals.[60] Most of the representatives from the black colleges voiced their opposition to the new rules at that time, and they suggested possible alternatives.[61] According to Stone, these efforts fell upon deaf ears.[62]

Why were there no black representatives on the Ad Hoc Committee? The answers are unclear and conflicting. J. W. Peltason, president of the ACE, defended the procedures employed.[63] He initially sought to include the presidents of the Division I-A universities, the so-called "big time football institutions."[64] These institutions include football powers such as the University of Alabama, the University of Georgia, the University of Michigan, and Pennsylvania State University; there are no black institutions and no black university presidents in Division I-A. Peltason said that when the Ad Hoc Committee determined that academic standards would be its top priority, he attempted to expand the Committee to include presidents of the historically black colleges.[65]

According to Peltason, his efforts were unsuccessful because some of the presidents of historically black colleges declined the invitation, asserting that they should have been included in the process from the very beginning.[66] Peltason's assertion that he anticipated the importance of a black presence on the Committee, however, seems overshadowed by the assertions of other individuals who saw the racial controversy as a surprise.[67] The surprise reaction suggests that black presence and participation on the Ad Hoc Committee may have indeed been an afterthought. This afterthought explanation for the lack of black presence on the Ad Hoc Committee seems consistent with the Committee's extension of a late invitation to Luna I. Mishoe, president of Delaware State University—a historically black college. Mishoe was invited only

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58. Telephone interview with Jesse Stone, President of Southern University, Baton Rouge, Louisiana (Feb. 17, 1983).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. Crowl, *NCAA Votes Stiffer Academic Requirements for Participants in Intercollegiate Sports*, Chronicle of Higher Education, Jan. 19, 1983, at 20, col. 3.
64. *Id.*
65. *Id.*
66. *Id.*
67. White, *N.C.A.A.'s High Aims Turn Into Rights Controversy*, N.Y. Times, Jan. 16, 1983, at 4S, cols. 2-4.

a week or two before the NCAA convention, well after the proposals had been developed and concretized.[68] Mishoe was the only black on the Ad Hoc Committee at the time of the NCAA convention, and as president of Delaware State, the only representative of a historically black college. However, no one seems to suggest that he had any opportunity to influence a process that was substantially completed before he became involved.

b) *The Exclusion of Representatives From Secondary Educational Institutions*

Neither the ACE nor the NCAA included representatives from the secondary educational institutions in the decision making process pertaining to the new rules. It appears that the ACE would not have been precluded from doing so, since one of its categories of voting members includes "other such nonprofit organizations as the Board of Directors may approve."[69] The NCAA Constitution, however, fails to allow secondary educational institutions to participate as affiliate members in any NCAA association, and does not provide such institutions a vote on NCAA matters; therefore, none of the governing bodies within the NCAA include representatives from secondary educational institutions.[70]

In addition to the fact that secondary educational institutions were not represented on the ACE and NCAA during the decision making process concerning the new eligibility rules, said institutions were not represented on the Ad Hoc Committee. Also, it is uncertain whether the Ad Hoc Committee considered the effect the changes would have on such institutions.[71] The letters and press releases of the Ad Hoc Committee, the only products of the Committee other than the NCAA motions, do not discuss the impact of the proposals on secondary educational programs within the United States.

The exclusion of representatives from the secondary educational institutions may be more significant when viewed from the perspective of the potential student-athlete affected by the new initial eligibility

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68. Farrell, *2 Civil-Rights Leaders Denounce NCAA's New Academic Standards*, Chronicle of Higher Education, Jan. 26, 1983, at 18, col. 3.

69. MEMBERS GUIDE, *supra* note 12, at 5.

70. *See* NCAA Constitution art. V, NCAA MANUAL, *supra* note 1, at 27-30; *see also* list of governing bodies and college representatives. *Id.* at 198-203.

71. This exclusion is a bit surprising since a 1974 ACE Report on Intercollegiate Athletics stated that secondary institutions as well as their students, teachers, counselors, administrators, and athletic department personnel are directly affected by the institution of intercollegiate athletics. AMERICAN COUNCIL ON EDUCATION STUDY 42-46 (1974). The report emphasized that "any effort to study intercollegiate athletics will have to take specifically into account not only the interests of the nation's secondary schools but also the influence they exert upon the conduct of college sports." *Id.* at 46.

rules. The secondary educational institutions and their representative bodies, including the interscholastic athletic associations, constitute the groups most closely related to the pool of high school athletes the NCAA seeks to exclude from first year competition. Whether these student-athletes are entitled to representation directly or indirectly need not now be decided to conclude that their interests are profoundly affected by the regulation of initial eligibility.

The magnitude of the pool of affected athletes is quite large. According to the NCAA, during the 1980-1981 year a total of 169,477 male athletes participated in NCAA-governed sports;[72] 75,023 of these athletes competed in Division I sports, the division covered by the new initial eligibility rules.[73] In that same year, 71,768 women engaged in NCAA regulated competition;[74] 31,201 of these women competed in Division I.[75] The new requirements will affect the 277 Division I institutions,[76] and thereby the student-athletes attending those institutions.

It has also been estimated that the adoption of the minimum test score requirement may have a drastic impact on the number of athletes eligible for collegiate competition. The Educational Testing Service (hereinafter ETS), the service that develops and administers the Scholastic Aptitude Test (hereinafter SAT) and the American College Test (hereinafter ACT), opposed the new minimum test score requirements because the "use of a fixed cut off score on national standardized admissions tests will have effects that may not have been fully realized before this decision was reached."[77] ETS president Gregory T. Anrig said that in 1981 the new requirements would have excluded 51% of black male freshmen and 60% of black female freshmen from competing in NCAA collegiate sports;[78] it was predicted that within the Big Eight Conference—which consists of the University of Missouri, University of Oklahoma, Oklahoma State University, Kansas State University, University of Kansas, Iowa State University, University of Colorado, and University of Nebraska—more than 60% of the black athletes now attending would have been barred from athletic participation in their freshman year had the newly adopted NCAA initial competition eligibility rules been in effect.[79] These Big Eight predictions differ from those of the ETS in that they estimate the potential impact

72. *See supra* note 16.

73. *See* Letter from NCAA to NCAA Members, *supra* note 2.

74. *See supra* note 16.

75. *Id.*

76. Vance, *Testing-Service Head Hits NCAA's Academic Rules*, Chronicle of Higher Education, Feb. 2, 1983, at 1, col. 2.

77. *Id.* at 1, col. 3.

78. *Id.* at 1, col. 3 and 18, col. 2.

79. Vance, *Academic Rules Would Affect blacks Far More than Whites, Study Finds*, Chronicle of Higher Education, Feb. 16, 1983, at 17, col. 2.

of the new initial eligibility rules on athletes, rather than upon all entering students theoretically capable of collegiate athletic competition.[80] The Big Eight predictions thus give a more realistic picture of the rules' impact on athletes.

3. The Substantive Concerns

a) *Intentional Exclusion of Black Athletes*

The most serious charge leveled at the ACE and the NCAA is that the new initial eligibility requirements were motivated in whole or in part by racism. The new rules are seen by some as a response to the domination of college sports by black athletes. As such, the academic integrity justification is thought to be merely a subterfuge for another goal: the exclusion of black athletes from collegiate sports.[81]

There are credible spokespersons for this characterization of the new eligibility changes. Jesse Stone has previously characterized the new rule changes as "patently racist."[82] He does not deny that some institutions have exploited student-athletes, and believes that most schools do genuinely care about educating students.[83] But he also believes that many colleges and universities are simply using the new rules as an excuse to discriminate against blacks in the name of quality and excellence.[84] This subterfuge explanation gains additional credibility, according to Stone, because the Ad Hoc Committee knew or must have known "the effects of an arbitrary rule like the SAT along racial lines . . . in advance."[85]

Another critic of the new rules explains their adoption by pointing to the hostility generated by black domination of major college sports. Edward B. Fort, chancellor of North Carolina A & T, stated: "The bottom line is the color of the majority of the kids who take the floor in the final Four"[86] (the semifinal round of the NCAA basketball championship). In recent years the majority of these players have been black;[87] the 1983 NCAA playoffs were no exception. The view that the offensiveness of the black domination of college sports might have been

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80. *Id.* at 17, col. 3.

81. Telephone interview with Jesse Stone, President of Southern University, Baton Rouge, Louisiana (Feb. 17, 1983).

82. White, *Black Colleges Threaten to Leave NCAA Over Academic Policy*, N.Y. Times, Jan. 13, 1983, at B16, col. 4.

83. Telephone interview with Jesse Stone, President of Southern University, Baton Rouge, Louisiana (Feb. 17, 1983).

84. *Id.*

85. *Id.*

86. White, *N.C.A.A.'s High Aims Turn Into Rights Controversy*, N.Y. Times, Jan. 16, 1983, at 4S, col. 4 (quoting Edward B. Fort, chancellor of North Carolina A. & T. State).

87. *Id.*

a motivating factor for the new rules is also shared by Joseph B. Johnson, president of Grambling University in Louisiana.[88] Johnson believes that "a message has been sent to black athletes across this country . . . . [T]here's just too many of you on America's athletic teams."[89] The fact that blacks were excluded from the decision making process, according to some, also indicates racist motivation.[90]

Other important individuals vigorously deny that the new rules were adopted to exclude black athletes from college sports. In the letters written by Bok and Peltason to college and university presidents summarizing the work of the Ad Hoc Committee, Bok and Peltason stressed the academic integrity justification for the new rules. Also, Sneldon Hackney, president of the University of Pennsylvania and a member of the Ad Hoc Committee, has emphatically defended the legitimacy of the new rules. In Hackney's opinion, the use of the SAT test is controversial, but it is nonetheless "the single best predictor of academic performance."[91] Also, according to Hackney, the Ad Hoc Committee

> thought about [the differential effect on black schools] and knew there would be those who would charge that the proposal was a racist proposal, so the Committee felt very carefully about doing something that would elicit that charge . . . and felt that it was good for everybody and it was worth going through the argument.[92]

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88. *See supra* note 48, at 9.

89. *Id.*

90. White, *N.C.A.A.'s High Aims Turn Into Rights Controversy*, N.Y. Times, Jan. 16, 1983, at 4S, col. 4 (quoting Jesse Stone, president of Southern University, Baton Rouge, Louisiana).

91. Ransom, *Black Colleges Blast Proposition 48*, National Leader, Feb. 3, 1983, at 28, col. 2. Controversy over the predictive value of the SAT rages. A 1980 report sponsored by Ralph Nader and authored by Allan Nairn charges that Educational Testing Service [hereinafter cited as ETS] tests, including the SAT, have little value in the prediction of academic performance. A. NAIRN, THE REIGN OF ETS: THE CORPORATION THAT MAKES UP MINDS (1980). The president of ETS responded to these charges formally in EDUCATIONAL TESTING SERVICE, TEST USE AND VALIDITY (1980) (statement in overview). President Turnbull defended the value of the SAT, but emphasized the ETS view that "[t]est scores . . . not be the sole factor in determining the admission of an applicant to an institution but should be considered one aspect of the description of an individual in this process." *Id.* at 11.

Thus, it would appear that Hackney is much more confident than the ETS about the validity of the SAT as a bottom line prediction of college performance. The ETS said in response to the Nader-Nairn report: *"On the whole, the tests are about as useful in predicting future academic performance as previous academic grades, the predictor that is most widely used and accepted."* *Id.* at 23 (emphasis in original). It should also be noted that the current president of the ETS, Gregory Anrig, doubts whether the ACE and NCAA fully realized the consequences of using a fixed cutoff score. Vance, *Testing-Service Head Hits NCAA's Academic Rules*, Chronicle of Higher Education, Feb. 2, 1983, at 1, col. 4.

92. *Id.* at 28, cols. 2-3.

Among both supporters and opponents of the new rules, continued reference was made to the debilitating distortion of the student role in college athletics and to the academic abuses that have occurred in athletic programs in the name of victory.[93]

The remarks of Joe Paterno, the nationally known coach from Pennsylvania State University, suggest that the academic integrity concerns may have been affected by racial concerns, and indicate an awareness of the issue of the legitimacy of black athlete participation in collegiate sports. Paterno made the most emotional plea for the new rules on the floor of the NCAA convention while the rules were being debated.[94] He said: "It's unfortunate we're talking black and white . . . . We've told black kids who bounce balls, run around tracks and catch touchdown passes that that is an end unto itself. We've raped them. We can't afford to do it to another generation."[95]

While charges and counter charges regarding motivation continue to be made, there is a general consensus on one issue—the potential impact of the new initial eligibility rules on black athletes.

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93. There is no question that supporters and critics of the rule agree on the need for some effort to restore academic integrity to college athletic programs. For example, Frederick Humphries, president of Tennessee State University, opposed the minimum test score requirement, but emphasized his understanding of the academic integrity issues:

> The credibility of the word "student" in student-athlete has been seriously eroded by a series of (NCAA) investigations of athletic programs. The NCAA investigations have found instances of recruitment violations, falsification of transcripts, the enrollment of student-athletes in phantom courses, and enrollment in phantom colleges where suitable grades are obtained to maintain academic eligibility for participation in intercollegiate athletics.

Ransom, *Black Colleges Blast Proposition 48*, National Leader, Feb. 3, 1983, at 28, col. 1. Jesse Stone's opposition to the new rules has been most stringent, but he strongly supports the concept of academic excellence. *Id.* The Reverend Jesse Jackson spoke up against the new rules: "We're taking a position minimizing standardized tests. We're alerting black organizations to the unreliability of standardized tests." Farrell, *2 Civil-Rights Leaders Denounce NCAA's New Academic Standards*, Chronicle of Higher Education, Jan. 26, 1983, at 18, col. 1. The position of supporters was reviewed extensively, see *supra* text accompanying notes 33-40, and was summed up by Ad Hoc Committee member L. Donald Shield, president of Southern Methodist University, who introduced the proposal on the NCAA convention floor. The standards were needed, according to Shields, to "preserve the integrity of the N.C.A.A. and of our institutions." Crowl, *NCAA Votes Stiffer Academic Requirements for Participants in Intercollegiate Sports*, Chronicle of Higher Education, Jan. 19, 1983, at 20, col. 2.

94. *Furor in San Diego: A Testing Problem for the NCAA*, Sports Illustrated, Feb. 21, 1983, at 9; Crowl, *NCAA Votes Stiffer Academic Requirements for Participants in Intercollegiate Sports*, Chronicle of Higher Education, Jan. 19, 1983, at 20, cols. 2-3; White, *Black Colleges Threaten to Leave N.C.A.A. Over Academic Policy*, N.Y. Times, Jan. 13, 1983, at B16, col. 6.

95. *See supra* note 48, at 9.

b) *The Impact of the New Rules on Black Athletes*

Both supporters and opponents of the new initial eligibility rules agree that they will have a disproportionate impact on black athletes. Estimates are that between fifty to sixty percent of black athletes eligible under the previous rules will be ineligible under the new rules.[96] The disproportionate impact is due in part to the marked difference that exists between the average SAT scores of white students and those of black students. According to the College Testing Board, the average combined verbal and math scores of white high school students between 1976 and 1982 ranged from 924 to 944, while the average combined verbal and math scores for blacks during the same period varied from 686 to 707.[97]

Some distinguish between exclusionary results that might have occurred in the past had the new rules been in effect, and what will happen if the new rules are applied in the future. For example, Joe Paterno suggests that black athletes are being "sold short" by critics of the new rules, and that the effective date of the new rules will give black athletes who desire to participate in college athletics an opportunity to

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96. *See supra* text accompanying notes 77-80.

97. Farrell, *2 Civil-Rights Leaders Denounce NCAA's New Academic Standards*, Chronicle of Higher Education, Jan. 26, 1983, at 18, col. 1-2. According to information obtained from the College Testing Board, SAT scores do differ markedly by race:

How Average SAT Scores Differ by Race

	White students			Black students		
	Verbal	Math	Total	Verbal	Math	Total
1976	451	493	944	332	354	686
1977	448	489	937	330	357	687
1978	446	485	931	332	354	686
1979	444	483	927	330	358	688
1980	442	482	924	330	360	690
1981	442	483	925	332	362	694
1982	444	483	927	341	366	707

SOURCE: COLLEGE BOARD

Id.

Some of the racial and ethnic group differences also appear associated with income differences as well:

bring themselves in compliance with the new requirements.[98] On the other hand, the apparent stability of the white-black SAT differential indicated by College Testing Board statistics suggests that the discriminatory impact of the SAT will not subside in the short run.[99] Also, it does not appear that the Ad Hoc Committee expected that impact to subside. Hackney's view bears repeating. According to him, the Ad Hoc Committee was aware of the impact the minimum test score requirements would have, and that the impact would generate a charge of racism. His recollection is that "[t]he Committee felt that it was good for everybody and it was worth going through the argument."[100]

III. The Legal Issues: Rationality and Accountability in Private Organizational Process

A. *Introduction*

Two powerful organizations, the NCAA and the ACE, recently promulgated rules that may have a wide-spread impact on both private individuals and institutions alike. These rules were promulgated by a

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Average Scores on Scholastic Aptitude Test, by Group

	Average S.A.T. score		Parents' median income	Median years of education		Average high-school grade	Proportion of students tested*
	Verbal	Math		Father	Mother		
American Indian	391	425	$20,100	13.4	12.5	2.93	0.6%
Black	332	362	12,500	12.2	12.4	2.75	9.0%
Mexican-American	373	415	17,000	12.0	11.8	2.99	1.7%
Asian/Pacific American	397	513	21,500	14.2	12.9	3.16	3.4%
Puerto Rican†	361	396	12,300	11.9	11.8	2.88	0.8%
White	442	483	26,300	14.2	13.4	3.10	81.9%
Other	388	447	18,500	13.7	12.4	2.96	2.2%
Men	430	492	25,100	14.2	13.2	3.00	48%
Women	418	443	23,700	13.9	13.1	3.11	52%
All students	424	466	24,300	14.0	13.1	3.06	100%

* Percentages do not add to 100 because of rounding

† Figure includes only students living in 50 states and District of Columbia

SOURCE: COLLEGE BOARD

White Students Score Highest on SAT Exams: New report shows link to family-income level, Chronicle of Higher Education, Oct. 13, 1982, at 14, cols. 1-3.

98. *See supra* note 48, at 9 (quoting Joe Paterno).

99. Farrell, *2 Civil-Rights Leaders Denounce NCAA's New Academic Standards*, Chronicle of Higher Education, Jan. 16, 1983, at 1, cols. 1-2.

100. Ransom, *Black Colleges Blast Proposition 48*, National Leader, Feb. 3, 1983, at 28, cols. 2-3.

small committee whose actions were eventually ratified by one of the wealthiest nonprofit sports organizations in the United States. The implementation of the new initial eligibility rules will affect high schools throughout the United States, and will limit access to high level advanced sports competition as well as advanced education. Yet the rules were developed and adopted in a process that was not only closed to affected groups and individuals, but in a process that produced no tangible evidence in support of the rationality of its product. Moreover, the intent of the ACE has been pejoratively characterized as racist and exclusionary. In light of the criticism that has surfaced since the adoption of the new initial eligibility rules, one question remains to be answered: Has the NCAA done more than make a decision with which some disagree? Put another way, was the NCAA action illegal?

Legal restrictions provide both a basis for prospective organizational restraint as well as a basis for retrospective legal condemnation. Both possibilities exist in the context of the new initial eligibility rules. Clarification of the legal issues may provide a basis for future modification of the rules. The rules do not take effect until 1986. Some individuals supported the rules as a first best step, with the understanding that they might be modified before their effective date.[101] Shortly after the NCAA adopted the new rules, the Ad Hoc Committee announced its

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101. Several sources indicate that the new rules are certain to be reconsidered prior to their 1986 effective date: *See Furor in San Diego: A Testing Problem for the NCAA*, Sports Illustrated, Feb. 21, 1983, at 9 (quoting Joe Paterno: "I think they are overreacting. If we find that some of the things aren't right, we're ready to modify it."); Vance, *Academic Rules Would Affect Blacks Far More than Whites, Study Finds*, Chronicle of Higher Education, Feb. 16, 1983, at 18, col. 3; Ransom, *Black Colleges Blast Proposition 48*, National Leader, Feb. 3, 1983, at 29, col. 3 (quoting Charles Harris, athletic director at the University of Pennsylvania: "I think that between now and 1986 when it's enforced, . . . there . . .will be enough latitude to be responsive to some of the concerns that have been raised."; quoting Sheldon Hackney, president of the University of Pennsylvania: "[T]he lead time was designed to . . . provid(e) . . . time for fine tuning the proposition."); Farrell, *2 Civil-Rights Leaders Denounce NCAA's New Academic Standards*, Chronicle of Higher Education, Jan. 26, 1983, at 18, col. 3 (quoting Luna I. Mishoe, president of Delaware State College: "I envision we are going to have answers to the question of whether the N.C.A.A. has the authority to do this. We will get the answers from legal sources. We might have some changes in the rules as early as next year."); Crowl, *NCAA Votes Stiffer Academic Requirements for Participants in Intercollegiate Sports*, Chronicle of Higher Education, Jan. 19, 1983, at 20, col. 3 ("John A. DiBiaggio, president of the University of Connecticut, suggested that if, on reflection, it seemed impossible for black colleges to meet the standards, there was ample time to modify them before they take effect in 1986."); White, *N.C.A.A.'s High Aims Turn Into Rights Controversy*, N.Y. Times, Jan. 16, 1983, at 48, col. 5 ("The new rule does not go into effect until August 1986. There will be second thoughts and maybe changes before then."); Interview with Chapin Clark, Law Professor and Athletic Representative of the University of Oregon (May 26, 1983). The Ad Hoc Committee's overtures to black college presidents also indicate the possibility of modification before the effective date. *See supra* note 52.

intention to engage opponents of the new rules, especially black opponents, in a constructive process aimed at achieving academic integrity in a context of unity.[102] Thus, the possibility exists that future discussions may occur in a context of increased restraint and deliberation, and that these discussions may reflect an explicit consideration of legal issues.

If the rules are not modified, they may present an occasion for retrospective legal condemnation. Immediately after the rules were announced, several presidents of the historically black colleges threatened legal action if the rules were not rescinded.[103] A conference was called by a number of blacks to discuss possible responses, including litigation.[104] Jesse Stone has indicated that should the NCAA and the ACE remain firm, a lawsuit might be pursued.[105]

The new rules may present constitutional as well as private law issues. One issue is whether the equal protection clause of the fourteenth amendment would be violated if the eligibility rules are implemented. Principles of association law may also provide an alternative source of restraint upon the NCAA as a private organization. Each of these issues will be discussed.

B. *Constitutional Limitations and the New Rules*

1. State Action

The concept of "state action" limits the potential application of certain constitutional restraints such as equal protection.[106] Generally speaking, the requirement of state action draws a boundary between "private" conduct beyond the reach of constitutional restraint, and "public" conduct that must meet constitutional requirements. When a governmental agency adopts rules pursuant to its own procedures and implements them without private involvement, the existence of the requisite state action presents no controversy. But where a private organization acts, the existence of state action depends upon whether the circumstances fit one of several rationales for the application of constitutional restraint to private entities. In determining whether state action exists, the following inquiries prove helpful: Has the private en-

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102. *See supra* note 52.

103. Vance, *Academic Rules Would Affect Blacks Far More than Whites, Study Finds*, Chronicle of Higher Education, Feb. 16, 1983, at 18, col. 3; Crowl, *NCAA Votes Stiffer Academic Requirements for Participants in Intercollegiate Sports*, Chronicle of Higher Education, Jan. 19, 1983, at 20, col. 1.

104. Vance, *Academic Rules Would Affect Blacks Far More than Whites, Study Finds*, Chronicle of Higher Education, Feb. 16, 1983, at 18, col. 3.

105. Telephone interview with Jesse Stone, President of Southern University, Baton Rouge, Louisiana (Feb. 17, 1983).

106. L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 18.1-18.7, at 1147-74 (1978).

tity assumed a "public function"?[107] Does there exist a "symbiotic relationship" or "nexus" between the private entity and the government such that the private entity ought to be subject to the same restraints as the government?[108] Is the impact of private activity upon rights so significant that the restraint is necessary in order to preserve those rights?[109]

While the applicability of the state action label may be extremely controversial in some circumstances,[110] its application to the NCAA seems appropriate. Several judicial decisions have rationalized the application of constitutional limitations to the NCAA. In *Parish v. National Collegiate Athletic Association*, a Fifth Circuit decision,[111] the court concluded that the NCAA performs traditional public-governmental functions "by taking upon itself the role of coordinator and overseer of college athletics—in the interest of both the individual student and of the institution he attends."[112] In *Buckton v. National Collegiate Athletic Association*, a decision of the Massachusetts district court,[113] the court labeled NCAA action as state action because the NCAA performed public functions and had a symbiotic relationship with public entities.[114] Similarly, in *Howard University v. National Collegiate Athletic Association*, a decision of the District Court for the District of Columbia,[115] the court relied upon the size, influence, and wealth of the NCAA to conclude that private institutions following its policies had engaged in the requisite degree of state action to require constitutional restraint.[116]

Although recent decisions of the United States Supreme Court seem to have narrowed the reach of the state action doctrine,[117] that arguable narrowing would not foreclose the application of the state action principle to the NCAA. The Court's recent decisions involved the application of the state action doctrine to varied fact situations: (1) to a

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107. J. NOWAK, CONSTITUTIONAL LAW 456-60 (1978).
108. *Id.* at 464-71.
109. *Id.* at 474-75.
110. *Compare* Austin, *The Problem of the Legitimacy of the Welfare State*, 130 U. PA. L. REV. 1510 (1982) (distinctions between the treatment of private and public entities may be obsolete in the modern state) *with* Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441 (1982) (distinctions between the treatment of private and public entities are articulable and defensible).
111. 506 F.2d 1028 (5th Cir. 1975).
112. *Id.* at 1032.
113. 366 F. Supp. 1152 (D. Mass. 1973).
114. *Id.* at 1156-57.
115. 367 F. Supp. 926 (D.D.C. 1973).
116. *Id.* at 928-29.
117. *See* Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982). *See infra* text accompanying notes 122-32 (discussing these decisions).

private school that was both state regulated and funded;[118] (2) to a private nursing home that was both state regulated and funded;[119] and (3) to a corporation that utilized state law attachment procedures to seize property for the payment of an overdue debt.[120] None of the recent decisions was unanimous. A careful reading of the various majority, plurality, concurring, and dissenting opinions merely reinforces the view that findings of state action are likely to be based on factual idiosyncracies rather than clear principles.[121]

A strained attempt to reconcile the recent decisions might produce one common principle: if the state explicitly approves the rules complained of and cooperates in their implementation, then sufficient state action may exist to impose constitutional restraint.[122] Perhaps this ten-

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118. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

119. Blum v. Yaretsky, 457 U.S. 991 (1982).

120. Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982).

121. Blum v. Yaretsky, 457 U.S. at 1004 ("factual setting of each case will be significant"). A more cynical view has been expressed by Professors Brest and Levinson:

> The characterization of action as "state" or "private" is at most a highly intuitive hermeneutic enterprise that attempts to capture generally held social and political norms of the time. At worst, it is a way of masking the fact that the distinction makes no sense in our legal culture—and of manipulating the outcomes of decisions in order to achieve covert substantive goals.

P. BREST AND S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 821 (1983).

122. This principle seems responsible for the finding of state action in Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982), and Blum v. Yaretsky, 457 U.S 991 (1982), and for its absence in Rendell-Baker v. Kohn, 457 U.S. 830 (1982). In *Lugar v. Edmonson Oil Co.*, a creditor of Lugar's sued on a debt and sought a prejudgment attachment of Lugar's property. Virginia procedures permitted the writ of attachment to issue on an *ex parte* petition alleging the potential disposition of the property. A writ of attachment was issued by a state court clerk, then executed by the county sheriff. Lugar complained that due process had not been afforded, and that the requirements of state action were met when Edmonson and the state cooperated to sequester his property. A majority of the Court agreed: "[W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." 457 U.S. at 941. But in *Blum v. Yaretsky*, where nursing home patients challenged the failure to accord due process in connection with transfers to facilities providing lower levels of care, the extensive governmental funding and regulation of nursing homes did not make the transfer decisions "state action." 457 U.S. at 1004. The Court noted:

> These regulations do not require the nursing homes to rely on . . . [governmental standards] in making discharge or transfer decisions, nor do they demonstrate that the State is responsible for the decision to discharge or transfer patients. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State.

Id. at 1008. Similarly, in *Rendell-Baker v. Kohn*, the extensive federal and state ties

tative rule emphasizing the lack of separation between public and private missions is similar in focus to the symbiotic relationship rule closely identified with the 1961 Supreme Court case of *Burton v. Wilmington Parking Authority*,[123] involving a racially discriminatory private restaurant operated in a public building.[124] While those members of the current Court least hospitable to broad state action have cautioned against its overextension,[125] they nonetheless have voiced their approval of the application of the doctrine when escape from the private rules complained of is virtually impossible because of state adherence to the rules, or when state activity encourages the private rules.[126] Justice Rehnquist, one of the Justices cautioning against overextension of the state action doctrine, recently said that "our precedents indicate that a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be

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(funding, regulation, cooperation) to a school for problem children did not make a teacher's speech-related dismissal "state action." 457 U.S. at 840-41. The Court found that "the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters." *Id.* at 841.

Of course, the "approval-cooperation" rule emerges from three decisions of a deeply divided court. Justices Rehnquist, O'Connor, and Burger found the requisite state action lacking in all three cases. Therefore, they dissented in *Lugar*, but joined the majority in *Rendell-Baker* and *Blum*. Not surprisingly, Justices Brennan and Marshall dissented in *Rendell-Baker* and *Blum*. But if the division makes it difficult to devise clear principles, the ideological differences seem nonetheless clear. Those intolerant of expansive state action interpretation believe that this "preserves . . . an area of individual freedom by limiting the reach of federal law and federal judicial power." Lugar v. Edmonson Oil Co., 457 U.S. at 950. Those less suspicious of harm done by the Constitution's reach concern themselves with the maintenance of constitutional limitation in our complex society with its emergent forms of state-private cooperation. They believe that

> if the fourteenth amendment is to have its intended effect as a restraint on the abuse of state power, courts must be sensitive to the manner in which state power is exercised. In an era of active government intervention to remedy social ills, the true character of the State's involvement in, and coercive influence over, the activities of private parties . . . may not always be apparent. [In this context], the courts' obligation to perform . . . faithfully, and consistent with constitutional purpose, is rendered more, not less, important.

Blum v. Yaretsky, 457 U.S. at 1012 (Brennan, J., dissenting).

123. 365 U.S. 715 (1961).

124. *See id.* at 724-26.

125. Lugar v. Edmonson Oil Co., 457 U.S. at 950 (Powell, J., dissenting) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.").

126. Blum v. Yaretsky, 457 U.S. at 1004 ("[O]ur precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.").

deemed to be that of the State."[127]

Subjecting the NCAA to the reach of the Constitution would not be inconsistent with recent Supreme Court decisions. Those decisions have not undermined the principle that closely intertwined joint ventures between private and public entities must abide by constitutional principles. Even if the foregoing principle is limited by the tentatively emerging requirement that the state must explicitly approve of private rules and cooperate in their implementation, it is nonetheless appropriate to subject the NCAA to the constitutional limitations.

The NCAA is composed of public and private institutions that have given the regulation of intercollegiate competition to the NCAA. The NCAA adopts rules through a process in which representatives from both public and private institutions participate. Once adopted, the rules are adhered to by all member institutions, public and private. In the case of the new initial eligibility rules, *all* institutions covered by the rules will apply them as of the effective date, or risk sanction by the NCAA. Public high school athletic programs and their counseling components may theoretically choose to ignore the new initial eligibility rules, but to do so would compromise promises offered by their sports programs. Therefore, the NCAA will rely on the future cooperation of both secondary and higher educational institutions in insuring an adequate pool of competitive student-athletes.

In the factual situation within which the NCAA, and in particular the new rules, operate, there is simply no distinction between NCAA action and public action. Intercollegiate athletic programs at public institutions must and do adhere to these rules; they adopt them as their own, and enforce them as well. An organization that eliminates choice for private as well as state institutions should be subjected to constitutional restraint. Whatever the rationale, such a result makes sense because it recognizes an indisputable fact of athletic life; in the world of intercollegiate athletics, there is but one well-kept playing field open to colleges and universities, private or public, and the NCAA is the groundskeeper.

2. Equal Protection

The new NCAA rules present several possible violations of the equal protection clause of the fourteenth amendment to the United States Constitution. It can be argued that the decision to adopt the new initial eligibility requirements was made with a conscious intent to exclude black athletes from college sports competition. It can also be argued that the new rules violate the equal protection clause because they will disproportionately exclude black athletes. Additionally, it may be

127. *Id.*

argued that the equal protection clause is violated because the new initial eligibility requirements draw an irrational distinction between those eligible for intercollegiate competition and those who are ineligible. Finally, it may be argued that the equal protection clause is violated when eligibility distinctions are applied to athletes but not to other students involved in demanding extracurricular activities.

a) *Unlawful Intentional Exclusion of Black Athletes*

The charge that the new rules were adopted to exclude black athletes presents a serious equal protection claim. The application of current precedent would render unconstitutional NCAA action that is consciously motivated by race, except in the narrow context of affirmative action, inapplicable to this situation.[128] While the principles that condemn racial motivation are clear, their appropriate application to particular factual circumstances is more controversial.

With respect to these circumstances, a number of factors may be relevant to a determination that the new rules were adopted to exclude blacks. It has been predicted that utilization of the SAT will have a greater impact on the eligibility of black athletes than it will have on the eligibility of white athletes, and thus will affect predominantly black colleges more than predominantly white colleges. While this "impact" evidence might support an inference of illicit motivation, such evidence is not per se proof that the purpose behind the adoption of the new initial eligibility rules was the conscious exclusion of black athletes from collegiate sports.[129] The inference of illicit motivation might be strengthened by evidence indicating that even though the Ad Hoc Committee and the NCAA knew that the SAT would have a disproportionate impact on black athletes and that its fairness and validity as a predictor of black academic achievement was open to serious doubt, these bodies refused to consider less exclusionary alternatives to achieve their goals. But these more damning inferences might be mitigated by evidence that identifiable persons were no doubt motivated by the legitimate desire for student-athletes who possess at least marginal aca-

128. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In both *Bakke* and *Fullilove*, a majority of the Court approved race-related purposes and racial classifications; in both cases the majority indicated that the circumstances under which such purposes and classifications might be acceptable were limited.

129. *See* Personnel Adm. of Mass. v. Feeney, 442 U.S. 256, 273 (1979) ("cases signaled no departure from the settled rule that the 14th amendment guarantees equal laws, not equal results"); Village of Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 271 (1977) ("finding that . . . decision carried a discriminatory 'ultimate effect' is without independent constitutional significance"); Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

demic potential. Indeed, if it is true that a student who fails to meet the eligibility requirements is also likely to be incapable of college work, the fact that more "incapable" students happen to be black is merely a distasteful, not illegal, result.[130] On the other hand, if it could be demonstrated that the new initial eligibility rules will do nothing to further the cause of academic integrity, given the pressure for the near professional achievement in intercollegiate sports, and that those adopting the rules were aware of this fact, perhaps the case for a finding of illicit motivation would be strengthened.

Realistically, there is little doubt that the new rules present a case involving mixed motivation (*i.e.*, a situation in which it is difficult to determine whether legitimate or illegitimate motivation is operative). In such cases, at least a conservative majority of the Supreme Court has been unwilling to condemn the entire enterprise.[131] In fact, more persuasive cases of illicit motivation have been presented and lost.[132]

b) *Equal Protection and the Disproportionate Impact on Black Athletes*

The SAT's anticipated disproportionate impact on the eligibility of black athletes arguably violates the equal protection clause. Such an argument raises the question whether, quite apart from conscious, discriminatory intent, the choice to use the SAT as an eligibility factor violates the equal protection clause because of the results said use will produce. Prior to the 1976 Supreme Court decision in *Washington v. Davis*,[133] federal courts agreed that a violation of the equal protection clause could be shown by demonstrating that a rule's application burdened one race more than another, and that the rule in question was unnecessary to the enterprise under scrutiny.[134] Since *Washington*, however, only intentional discrimination, not impact discrimination, vi-

130. *Cf.* Washington v. Davis, 426 U.S. 229 (1976) (equal protection not violated where four times more blacks than whites failed a police academy qualifying test). *See also* City of Mobile v. Bolden, 446 U.S. 55 (1980) (at large electoral system in southern county that foreclosed election of blacks and perpetuated discrimination in municipal services and employment not unconstitutional).

131. *See, e.g.*, Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982) (California antibusing amendment adopted during busing controversy not illegally racially motivated); City of Mobile v. Bolden, 446 U.S. at 92 (Stevens, J., concurring) ("[L]egitimate political choices can[not] be invalidated simply because an irrational or invidious purpose played some part in the decision-making process.").

132. *See* Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982); City of Mobile v. Bolden, 446 U.S. 55 (1980); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) (Georgia bar examiners' failure of 100% of black bar examinees not unconstitutionally motivated).

133. 426 U.S. 229 (1976).

134. *See* Washington v. Davis, 426 U.S. 229, 244-45 n.12 (1976) (listing 16 lower court decisions that stood for the principle).

olates the equal protection clause. As noted above, the proof of discriminatory impact may give rise to an inference of discriminatory intent, especially where the rule involved seems to contribute little to the solution of a problem. But the rule of *Washington*, amidst criticism,[135] still stands: a complaint based solely on the contention that the new rules produce a discriminatory impact will be constitutionally defective.[136]

c) *The Irrationality of the New Rules*

The third equal protection argument against the new rules assails the legitimacy of the line drawn between eligible and ineligible students. Allegedly, the equal protection clause prevents irrational distinctions or classifications between people. To paraphrase the most recent

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135. *See* City of Mobile v. Bolden, 446 U.S. 55, 135 (1980) (Marshall, J., dissenting) (standard based solely on motivation creates significant proof problems and invites officials to mask motivation through "subtlety and illusion"). *See also* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978) (unceasing search for guilty "perpetrator" threatens to limit progress toward quality).

136. Recent interpretations of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 200d-1 to -d-6 (1976 & Supp. VI 1981), and the 1972 amendment thereto, 20 U.S.C. § 1681(a) (1976), suggest that an adverse impact claim based upon a federal statutory claim might fare better than a constitutional claim. Title VI prohibits discrimination on the basis of race and color in connection with programs and activities receiving federal financial assistance. This nondiscrimination provision has long been interpreted to prohibit intentional discrimination as well as impact discrimination. Lau v. Nichols, 414 U.S. 563, 568 (1974). But black athletes raising such a claim will have to demonstrate that the impact occurred in connection with a program or activity receiving federal financial assistance. *See* Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1077-79 (5th Cir. 1969) (prohibitions of Title VI are program specific). *Cf.* North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) (statute modeled after Title VI is program specific). A recent Fifth Circuit decision suggests a line of reasoning to overcome the usual flat assertion that athletic programs are not covered because they receive no direct financial aid. In Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549, 562-64 (5th Cir. 1983), the Fifth Circuit broadly interpreted the language "program or activity receiving federal financial assistance" and rejected the narrow dollar-tracing approach as dispositive. The court found that an honor society's discrimination against women undermined the self-worth of women participating in a university's federally funded educational activities. In essence, it held that the importance of the honor society to the university justified the attribution of the honor society's discriminatory practices to the university. *Id.* at 564.

Sports programs can certainly be analogized to the honor society in *Iron Arrow*. The prestige of sports programs inures to the benefit of the university in innumerable ways. Also, participation in intercollegiate athletics enhances the prestige and stature of the athletes involved, whether or not this adulation is condoned. Furthermore, the discrimination arising from the impact of eligibility requirements may be even more egregious than that practiced by an honor society since access to the university or college experience may be at stake. The athletic contest is the most visible "educational" activity of the academy and may almost be considered an oracle on the worth of the university. Surely this aspect of university life is attributable to the university for purposes of determining compliance with Title VI.

Supreme Court standard, irrational classifications are unreasonable means for the achievement of legitimate ends.[137] In the NCAA context, the "end" is academic integrity, and the "means" are the eligibility standards. Will these means meet constitutional standards? Probably so.

The Supreme Court decisions establish different standards for the review of classifications (*i.e.*, distinctions in treatment between individuals). In situations where the basis for a distinction between individuals is an individual's membership in a so-called "suspect class" (*e.g.*, a racial group such as the black race), the standard of review is rigorous and the classification is usually difficult to justify.[138] The same holds true when the classification affects the exercise of "fundamental rights" (*e.g.*, religious practice).[139] But when the equal protection complaint neither implicates a suspect class nor the exercise of a fundamental right, the standards for review are less demanding.[140]

Recently, the Supreme Court said that it "has consistently refused to invalidate on equal protection grounds legislation which is simply deemed unwise or unartfully drawn."[141] In that same decision, the majority of the Court said that the only question "is whether Congress achieved its purpose in a patently arbitrary or irrational way."[142] But "[w]here . . . there are plausible reasons for Congress' action . . . [i]t is . . . 'constitutionally irrelevant whether this [patently arbitrary or irrational] reasoning in fact underlay the legislative decision . . . .' "[143] At least two members of the Supreme Court disagree with this extremely deferential approach.[144] However, the Court's most recent statements are merely the last in a long line of decisions espousing deference to legislative decision making. These decisions merely require an inquiry into whether the NCAA is attempting to achieve its purpose of

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137. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980).

138. Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (preference based on racial or ethnic criteria must necessarily receive a most searching examination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (Powell, J., announcing judgment) ("[A] State must show that its purpose or interest is both constitutionally permissable and substantial, and that its classification is 'necessary . . . to the accomplishment' of its purpose . . . . ").

139. *See, e.g.*, Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) (A state can justify a burden placed on religion "by showing that it is the least restrictive means of achieving some compelling state interest."). *See also*, City of Akron v. Planned Parenthood, ___ U.S. ___, 103 S. Ct. 2481 (1983).

140. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980).

141. *Id.* at 175.

142. *Id.* at 171.

143. *Id.* at 179.

144. *Id.* at 184 (Brennan, J., dissenting) ("[T]he rational-basis standard 'is not a toothless one,' . . . and will not be satisfied by flimsy or implausible justifications . . . proffered after the fact . . . . ").

academic integrity "in a patently arbitrary or irrational way."[145]

It is plausible that a 2.0 high school grade point average, some minimal academic content in high school courses, and a 700 SAT score will produce players better equipped to withstand the rigors of both intercollegiate athletics as well as a college curriculum. But an investigation into the facts of intercollegiate athletic life might suggest otherwise. Indeed, in view of the time and emotional commitment required of many intercollegiate athletes, one might conclude that the new rules will make a marginal contribution to the goal of academic integrity in intercollegiate athletics. However, the extremely deferential view that characterizes this branch of equal protection doctrine makes the actual facts of intercollegiate athletic life irrelevant to the constitutionality of the eligibility classification.

The deferential approach was followed in a Fifth Circuit Court of Appeals case involving the initial eligibility rule in effect prior to 1973. In *Parish v. National Collegiate Athletic Association*, the previous eligibility rule was challenged on equal protection grounds.[146]

> This rule required that NCAA-affiliated schools grant athletic scholarships, first year eligibility for participation in athletics, and other benefits only to applicants who could "predict"—on the basis of their high school grade point average or class rank and their grade on one of two standardized achievement tests—a minimum 1.600 grade point average during their first year in college.[147]

The court said that the challenged classification should be tested only under the traditional "minimum rationality" standard.[148]

The Fifth Circuit affirmed the decision of the federal district court in *Parish*, but did not provide any reasoning to support its decision. The federal district court in *Parish* gave more attention to the equal protection issue. The district court stated that the 1.600 Rule was

> a means of insuring that the athlete be an integral part of the student body and to maintain intercollegiate athletics as an integral part of the education program . . . . [T]hese rules . . . would prevent exploitation of athletes by the college or university . . . [by] prevent[ing] recruitment for athletic purposes alone of young men who had relatively poor chances of obtaining academic degrees; [the rules would also] encourage institutions with lower standards to elevate those standards to be more compatible with other institutions . . . .[149]

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145. *Id.* at 177.
146. 506 F.2d 1128, 1131 (5th Cir. 1975).
147. *Id.* at 1130.
148. *Id.* at 1134.
149. Parish v. National Collegiate Athletic Ass'n, 361 F. Supp. 1220, 1226 (W.D. La. 1973).

The district court noted that the application of the rule might "produce seemingly unreasonable results in certain situations, . . . [but reminded that] [s]uch results do not condemn those rules under traditional equal protection scrutiny."[150]

This result seems inappropriate, as a matter of course, given the difference between ordinary legislative process and the process leading to the adoption of the new rules. One important theoretical basis for the deference given to the results of the legislative process in the representative nature of the process.[151] The argument is that in a representative process in which all interests compete, the preclusion of imperfect, compromise solutions would undermine the ability of the legislature to achieve results acceptable to a majority of the representatives and to the people.[152] Therefore, evidence that the legislative process is unrepresentative in that it does not permit the participation of all groups affected by the results is grounds for disregarding the deference generally accorded the legislature in cases such as this.[153] Thus, even though courts might summarily dismiss the equal protection claim, such dismissal is unwarranted because the process leading to the promulgation of the rules was closed to important groups undisputedly affected by the new rules.[154] The proper result would be to invalidate the entire result of the process.

d) *The Irrationality of Distinctions Between Students Engaged in Extracurricular Activities*

NCAA members will accept the new rules and apply them to their student-athletes, thereby establishing a distinction between the treatment afforded to student-athletes and the treatment afforded to other students engaged in extracurricular activities. Numerous extracurricular activities share characteristics of intercollegiate athletics. Activities such as band, orchestra, debate, student government, fraternities and sororities, theater, and student newspaper consume time and divert the attention of students away from "academic" pursuit. Generally, with

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150. *Id.*

151. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (suggesting that deference to legislative enactments might not be appropriate when the political process is closed or tainted); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 102-03 (1980) (Judicial review should reinforce participation and representation, limiting intervention when these requirements are satisfied and engaging in intervention when they are not.).

152. City of Mobile v. Bolden, 446 U.S. 55, 92 (Stevens, J., concurring) ("[L]egitimate political choices can[not] be invalidated simply because an irrational or invidious purpose played some part in the decisionmaking process.").

153. *See* Terry v. Adams, 345 U.S. 461 (1953) (exclusion of black from private primary violated fifteenth amendment).

154. *See supra* text accompanying notes 52-80; *see also supra* note 55.

respect to these activities, no initial eligibility requirements are imposed other than those that satisfy the general admission requirements of the institution. Additional eligibility requirements may be imposed, but these requirements are related to the skill demands of the particular activity involved rather than to unrelated academic coursework. Thus, students involved in extracurricular activities other than intercollegiate athletics have unlimited freedom as freshmen to pursue their activities in spite of the clear potential for academic peril, while the eligibility and participation of freshmen student-athletes is controlled.

Is this distinction between students who participate in extracurricular activities patently arbitrary or irrational? By now it should be obvious that courts would presume the existence of a rational basis for these distinctions. What might courts presume? Certainly, a court might presume that university administrators believe the extracurricular demands presented to the student-athlete differ in magnitude and scope from those facing nonathletes involved in extracurricular activities. College administrators may hypothetically believe that although other extracurricular activities are indeed time intensive, the level of emotional and physical commitment required for participation in intercollegiate athletics exceeds that required for other extracurricular activities. Additionally, a court may presume that administrators believe students who have distinguished themselves athletically in high school are less likely to adequately prepare for college study. Thus, college administrators may believe that these students require more intense screening than other students involved in extracurricular activities. Finally, a court may presume that college and university administrators have realized that the pressure on intercollegiate athletes to accord low priority to academic endeavors is great, and that accession to this pressure is a requirement of participation in intercollegiate sports. Intercollegiate athletics is singular and distinctive in its ability to command the resources and attention of campus officials, alumni, and the public. Thus, while college and university administrators may believe these pressures to be excessive and uncontrollable, they may also believe that these pressures are necessary and acceptable.

In sum, a court may presume that administrators believe the intercollegiate athletic experience is different from the extracurricular experience in other contexts. Moreover, a court may presume that the additional requirements are believed to be necessary to permit intercollegiate athletes greater flexibility to accept the necessary and consuming diversion from academic activities required by their athletic activities. Such hypothetical beliefs would justify distinctions between student-athletes and other students involved in extracurricular activities, and would support a rejection of an equal protection claim.

These beliefs might constitutionally legitimatize the new rules, but they do little to shore up the assertion that athletes are indeed "students." At best, these beliefs would reflect a growing awareness of the

incompatability of student status and athlete status. At worst, they reflect an acceptance of the distortion of academic life that serious intercollegiate athletic participation can produce.

C. *"Private" Association Law and the New Rules*

1. Legitimating the Scrutiny of the NCAA as a "Private" Association

Are there principles beyond constitutionalism that might provide a basis for evaluating the new rules? Common law doctrines of private association govern groups who voluntarily join together in a formalized structure to attain goals. Ordinarily, courts are indisposed to interfere with the internal management of a voluntary association. The judicial policy of deference to private organizations has been based primarily upon freedom of association and freedom of contract principles. These principles, as well as a healthy tolerance for private organizations in the midst of an increasingly governmentally controlled world, generally immunize private associations from outside scrutiny.

However, the nature of organizations differ. Some nominally private organizations assert considerable power over both nonmembers and society. Some organizations are not amenable to meaningful control by their members. In addition, many of the same organizations exert monopolistic control over certain societal activities. As a practical matter, an individual desiring to engage in those activities has no choice regarding membership. Unlike truly private organizations, organizations that wield considerable power, simultaneously circumscribing private choice, and that affect the public interest have a lesser claim to autonomy and independence. This lesser entitlement is justified by the decision of the organization to extend the scope and reach of its activities into the public domain.[155] Similar considerations have influenced courts to treat organizations as the "state" for purposes of constitu-

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155. Pinsker v. Pacific Coast Soc'y of Orthodontists, 460 P.2d 495, 499 (Cal. 1969) (professional association licensing orthodontists affected with public interest and subject to judicial supervision). *Accord* Pinsker v. Pacific Coast Soc'y of Orthodontists, 526 P.2d 253, 267-68 (Cal. 1974) (en banc); Bunzel v. American Academy of Orthopedic Surgeons, 165 Cal. 3d 433, 435 (Cal. Ct. App. 1980); Higgins v. American Soc'y of Clinical Pathologists, 238 A.2d 665, 671 (N.J. 1968); Falcone v. Middlesex County Medical Soc'y, 170 A.2d 791, 799 (N.J. 1961). *See generally* Chaffee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 983 (1963). Intervention in the activities of labor unions has been justified on the basis of similar principles. *See* James v. Marinship Corp., 155 P.2d 329, 340 (Cal. 1945) (labor union attaining monopoly of labor through closed shop cannot discriminate against blacks); Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 615 (1959); Affeldt & Jeney, *Group Sanctions and Personal Rights—Professions, Occupations, and Labor Law*, 11 ST. LOUIS U.L.J. 382, 387-88 (1967).

tional limitations.[156] The practical result in the "state action cases" is similar to that which occurs when private associations are held to standards higher than they may be willing to impose upon themselves.

The recent NCAA controversy over television contracts illustrates the propriety of restraining nominally "private, voluntary" organizations. In *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association*,[157] NCAA members, including the University of Oklahoma and the University of Georgia, sued the NCAA, challenging its control of television contracts.[158] These members claimed that the NCAA had fixed prices, limited the number of games that a school could broadcast, and arranged a group boycott, all in violation of the Sherman Antitrust Act and the Clayton Act.[159] These violations were alleged to have occurred in connection with the rules adopted pursuant to a NCAA bylaw added in 1971.[160] The district court agreed with these contentions and declared that the NCAA policies restricting member telecasts and cablecasts were illegal.[161]

Board of Regents underscores the point that voluntariness and democracy in organization do not necessarily serve the public interest. In *Board of Regents*, the NCAA sought to escape legal condemnation on the theory that the NCAA is a voluntary and democratic organization.[162] The court responded by noting and emphasizing that in the context of serious college football, the organization was not voluntary in a meaningful sense, and that the democratic nature of the organization was irrelevant.[163] Although antitrust principles present an opportunity for the application of settled principles of public law, the importance of the case to the scrutiny of the NCAA rules is no less important. NCAA rules are not acceptable merely because a majority of those attending a convention adopt them. The nature of the organization and its impact on education and society in general support the availability of judicial oversight.

Moreover, the nature of the student interest in athletic participation also supports scrutiny of the NCAA rules. Most courts have been unwilling to say that a constitutional right to participate in school spon-

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156. *See supra* text accompanying notes 106-07.

157. 546 F. Supp. 1276 (W.D. Okla. 1982), *aff'd in part, rev'd in part*, 707 F.2d 1147 (10th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3303 (U.S. Oct. 18, 1983) (No. 83-271).

158. 546 F. Supp. at 1282.

159. *Id.* at 1301-24.

160. *Id.* at 1284. NCAA bylaw 11-3-(aa) provided that "the [Football Television] Committee shall be responsible for the formulation and administration of the Association's football television policy and program, subject to the approval of the membership." *Id.* at 1284 (quoting the NCAA MANUAL, *supra* note 1).

161. 546 F. Supp. at 1311, 1313, 1319, 1323.

162. *Id.* at 1308-09.

163. *Id.* at 1288, 1308-09.

sored athletic events exists.[164] However, those courts have nonetheless recognized that the interest "is a substantial and cognizible one,"[165] likely deserving of some degree of constitutional protection. The rationale for the conclusion that athletic participation may not be arbitrarily denied rests on the perception, espoused by schools fielding athletic teams, that athletic activities are an important and integral facet of the educational process. In addition, participation in sports activities does bestow upon the athlete important psychological, social, and physical benefits.[166]

The substantiality of the interest increases at the college level. This is due in part to the economic stake of the student in certain important college sports. In addition, not only is the athlete often exchanging his prowess for an education, "the chance to display . . . athletic prowess in college stadiums and arenas throughout the country [may be] worth more in economic terms than the chance to get a college education."[167] Even if the college athlete does not reach the professional ranks, our sports-dominated culture often rewards outstanding college athletes in both tangible and intangible ways. Viewed from several different perspectives, the interests of athletes cannot be lightly disregarded. Moreover, these are interests that are not formally represented in the NCAA process, or by member institutions.[168]

2. The Application of Existing Association Law Principles to the New Rules

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164. *See, e.g.*, Brenden v. Independent School Dist., 477 F.2d 1292, 1299 (8th Cir. 1973).

165. *Id.*

166. The court in *Brenden* emphasized the educational and emotional values of athletic competition. *Id.* at 1298. Principles of self-reliance, cooperation, perserverance, and discipline are explicitly and implicitly taught in the course of athletic competitive activity. Competitive athletic experience especially integrates the physical dimension of bodily function with its social, psychological, emotional, and cultural elements. Increased competition enhances this integration, and permits individuals to gain a more precise awareness of their strengths and shortcomings. *See* Kew, *Values in Competitive Games*, QUEST 103-11 (Monograph 29, 1978); Kohn, *Why Competition?*, 40 THE HUMANIST 14-15 (1980); Wohl, *Competitive Sport and Its Social Function*, 5 INTERNATIONAL REVIEW OF SPORT SOCIOLOGY 117-24 (1970).

167. Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972).

168. Athletes may have interests which diverge from, and are not represented by, the NCAA or its members. *See supra* note 55. *See also* J. WEISTART & C. LOWELL, LAW OF SPORTS, § 1.14, at 43 (1979) [hereinafter cited as WEISTART & LOWELL] (athletes not members of organizations governing them and may not choose whether to be governed); AMERICAN COUNSEL ON EDUCATION STUDY, *supra* note 71, at 127 ("*Inquiry suggest[s] that most of the rules for the conduct of intercollegiate sports were written to protect institutions from each other in the big time sports and that the interests and education of athletes themselves, as individuals, come second.*") (emphasis in original).

How would this oversight necessarily result in the rejection of the new rules? The result would probably depend upon the amount of deference a court would be willing to afford the NCAA in its rule making capacity. Traditionally, courts have been unwilling to scrutinize the actions taken by an association in the absence of an allegation that the association's actions involved fraud, or were capricious, arbitrary, or illegal.[169] The action taken by the NCAA in the adoption of the new initial eligibility requirements did not involve fraud, nor was the action capricious or illegal; perhaps an argument could be made that the lines drawn between the eligible and ineligible are "arbitrary." However, the traditional approach encompasses a deference to the expertise of the governing body. No doubt the involvement of an impressive group of college presidents on an Ad Hoc Committee chaired by the president of Harvard University would eliminate the threat of serious inquiry into the arbitrariness of the new rules under the traditional association approach.

Other courts have been more willing to examine the association's action, not for fraud, caprice, arbirariness, or illegality, but to determine whether the action is "reasonable."[170] In these cases, courts have looked closely at the opportunities that would be affected by the association's action, and the extent to which the activity governed by the association is, in a figurative sense, "the only game in town."[171] The more rigorous standard of reasonableness, however, would not necessarily produce results different from a constitutional analysis employing the same standard in an equal protection context.[172]

3. A More Meaningful Scrutiny Under Suggested Association Law Principles

A more meaningful scrutiny of the new rules should encompass several elements. Rather than merely scrutinizing the rules, assuming their reasonableness, a court should look at several factors to determine whether the NCAA rules should pass muster. One factor would be the extent to which the NCAA process adequately insured representation of all individuals and groups likely to be affected by the rules. This factor is included because scrutiny of "private" arrangements justifia-

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169. *See* Parsons College v. North Cent. Ass'n of Colleges and Secondary Schools, 271 F. Supp. 65, 70 (N.D. Ill. 1967), *cited in* WEISTART & LOWELL, *supra* note 168, at 40.

170. *See* Marjorie Webster Junior College v. Middle States Ass'n of Colleges and Secondary Schools, 432 F.2d 650, 655 (D.D.C. 1970).

171. *See* Board of Regents of the Univ. of Okla. v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1308 (W.D. Okla. 1982), *aff'd in part, rev'd in part*, 707 F.2d 1147 (10th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3303 (U.S. Oct. 18, 1983) (No. 83-271) ("membership in NCAA is not voluntary in any meaningful way").

172. *See supra* text accompanying notes 151-52.

bly turns, in part, on the extent to which those arrangements affect individuals and entities not represented in the association.

The second factor should be whether impermissible ends or results have been incorporated into the rule making process. Certainly, joining together to accomplish ends forbidden by law, such as to secure a monopoly in trade or to deny education to individuals on the basis of race, would constitute impermissible ends condemned by formal statutory enactments. Other ends and results might be forbidden by common law (*i.e.*, fraud and misrepresentation). A decision to investigate an association after an allegation that the association has violated public policy should not be questioned, since a court would merely require that the association comply with standards already adjudged to be in the public interest.

Another example of a forbidden end might be the adoption of rules that violate the organization's own rules, such as the proscription of professionalism in college sports set forth in the NCAA Constitution. The justification for requiring adherence to an organization's own principles is self-evident. Basically, the premise of an association is that fundamental governing principles and standards may only be changed in prescribed ways. Permitting an organization to violate its own rules denigrates the concept of voluntary association on the basis of shared ideals and principles.

The third factor a court should consider in determining the validity of the NCAA new initial eligibility rules should be whether the rules adopted are a reasonable resolution of an issue, given the existence of competing interests that have been fully considered. In the absence of a formal resolution of an issue by legislative authority, it makes sense to permit a reasonable resolution of a private body to stand. This disposition, however, should only be permissible when that body has permitted representatives of all affected by the action to be heard, and when the association has reached a solution that reasonably moderates the competing interests.[173] What result should be reached after the application of the suggested approach?

a) *The Representation of Affected Interests*

The first factor stresses the participation or representation of individuals or entities affected by the new rules in the development and formulation of those rules. The participation of those who will be affected by the new rules lends legitimacy to the rules; to the extent that

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173. *Cf.* WEISTART & LOWELL, *supra* note 168, § 1.14, at 39 (courts undertaking balancing process to insure that associational power is exercised consistent with interests of members and intersts of public); Chaffee, *supra* note 155, at 1008 (terms and conditions of association's constitution and bylaws not a contract in ordinary sense and should not finally determine rights of members or powers of association).

interested individuals and entities where excluded from the formulation process, however, undermines the legitimacy of the new rules.

The new rules fair poorly with respect to this factor. Even if one rejects the charge that the new rules were intended to result in the exclusion of black athletes, the serious charge remains that the new rules, adopted without black athletes being represented in the formulation process, will severely limit black participation in intercollegiate athletics. Similarly, the historically black colleges, those institutions likely to be hardest hit by the application of the new eligibility requirements and likely to view their institutional interests as coextensive with the interests of black student-athletes, were not represented during the formulation process.

There is already evidence that the new initial eligibility requirements have begun to produce reverberations in the secondary schools. Secondary schools with students desiring athletic scholarships will have to counsel and plan programs with the new initial eligibility rules in mind. However, these schools were not represented in the process leading to the adoption of the rules. In short, these rules were formulated via a process in which important interest groups were unrepresented, thereby rendering the legitimacy of the rules questionable.

b) *Impermissible Purposes or Results*

The charge that the new initial eligibility rules were motivated by conscious racism was discussed in connection with the equal protection section of this article.[174] It appears that those who proposed and adopted as well as those who opposed the rules knew that the potential impact would fall hardest on prospective black athletes, primarily because a standardized test was selected as an eligibility-limiting factor. It was also noted that a degree of race consciousness has emerged within the NCAA and the public due to the domination of certain sports by black athletes. But the academic integrity concerns that also prompted the eligiblity changes are quite real, and they have been publicly substantiated. Since legitimate concerns undoubtedly underlie the new rules, a court might find for or against racial motivation, depending on the weight of the evidence introduced. This approach would uphold the strong public policy, conscious of racial discrimination, embodied in the federal constitution and statutes, as well as the constitutions and statutes of the states. A decision to limit judicial scrutiny to a search for determinative racial motivation would also parallel the current Supreme Court's interpretation of the equal protection clause. If a court concludes that the dominant motivation behind the formulation and adoption of the new initial eligibility requirements was racial in

174. *See supra* text accompanying notes 50-95.

nature, the rules should be considered irrevocably tainted. (A decision that legitimate motivating factors were dominant would not automatically result in approval of the rules.)

On the other hand, a court emphasizing the educational access issues presented by the new rules might justifiably find that the racial issues undermine the legitimacy of the new rules. The evidence of racial consciousness in the formulation and adoption processes of the new rules, the predicted adverse racial impact, and the lack of black representation in the rule formulation process support a deeper inquiry into the reasonableness of the solution to the problem of academic integrity in college sports.

c) *The Reasonableness of the Rules in Light of Competing Interests*

Whether the rules are legitimate should ultimately depend upon whether the rules present a reasonable solution that also reasonably moderates the competing interests at stake. The lack of representation of affected interests, the costs imposed on certain groups, and the possible taint of impermissible ends require a deeper inquiry into the reasonableness of the solutions adopted.

The enactment of new initial eligibility rules was one of the solutions adopted by the NCAA for the problem of academic integrity. Students, according to the new rules, are required to achieve a minimum score on a standardized test and complete a required high school curriculum with a minimum grade point average. This solution was adopted, however, with knowledge and acceptance of an adverse impact on blacks. The record is devoid of any consideration of other, less discriminatory alternatives. However, by the time the NCAA convention was convened, alternative solutions with less discriminatory impact had been raised.

One alternative solution addressed the broader issue of freshman eligibility per se. According to Chapin Clark (former dean of the University of Oregon Law School, the NCAA athletic representative for the University of Oregon, and a delegate to the 1983 NCAA convention), some people believe that "freshmen should not be eligible in Division IA (big time) football and basketball. Rather, they should remain eligible for four years after the freshman year (and after they have satisfactorily completed a year of academic work)."[175] According to Clark, some schools already "redshirt" a large percentage of freshmen in football and basketball while permitting them to practice and retain their scholarships.[176] He suggests that a middle ground solution

175. Interview with Chapin Clark, Law Professor and Athletic Representative at the University of Oregon (May 26, 1983).

176. *Id.*

might be the retention of a 2.00 qualifying high school average combined with mandatory redshirting of all freshmen.[177] Under this proposal, freshmen would receive financial aid and might practice under limited conditions.[178] Clark believes that this approach would not only distinguish "big time" football and basketball from other sports, but would limit the possible exploitation of athletes at the expense of their educational development.[179] He also notes that this approach would also enhance educational and sports opportunities by preserving an additional year of financial aid eligibility,[180] and that it would eliminate the discriminatory impact of the new rules with respect to black and minority high school graduates.[181]

According to Clark, a genuine problem was created when freshmen became eligible to compete in big time football and basketball.[182] These freshmen have suffered in two ways: (1) athletically, due to the cutthroat competition for which they are often ill prepared; and (2) academically and athletically, if they are unable to "make the cut" gradewise.[183]

In light of these comments, the adopted solution makes minimal inroads into the serious problem of freshmen eligibility for big time sports. Moreover, the new initial eligibility rules fail to distinguish between the schools with big time college sports programs and other schools with less prestigious sports programs where less pressure is placed upon the student-athletes. Finally, the new initial eligibility rules will have a serious adverse racial impact, and will thus exacerbate the already serious problem of minority access to higher education. It would thus appear that while the new initial eligibility solution is cosmetically neat, it does not solve the problem that prompted its formulation and adoption.

The limitations on initial eligibility, viewed in a vacuum, are arguably a reasonable solution to the academic integrity problem. However, when the interests of affected individuals and institutions are considered—and taken seriously—the reasonableness of the solution seems less apparent. Moreover, the solution does little to address the time and energy demands of certain college sports. Not only are the rules inadequate for the problems, they attempt to solve certain academic problems by imposing a great cost on minority interests. Therefore, the rules ought to be reconsidered by the NCAA or declared illegal by a court.

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177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*

IV. Beyond Athletic Hegemony to Academic Integrity: Towards Meaningful Change in the Rules of the Game

A. *Introduction*

Existing constitutional standards will not require that the NCAA pursue academic integrity in a meaningful way. Rather, the mere application of constitutional standards may legitimize an inadequate solution to the problem of the domination of athletic value over academic value. True reform would mean going much further than the Constitution would require. It would demand that a choice be made to change the rules applicable to college sports so that the rules clearly favor academic values. But the rules that clearly favor academics would not only change college sports, they would also change our sports-dominated culture.

A commitment to recruit, train, cultivate, and promote a team capable of multimillion dollar revenues may be inconsistent with a simultaneous commitment to provide a quality university education to that same team. If indeed such an obvious inconsistency of goals exists, policymakers in higher education may have to make important choices. One choice might be to leave matters as they are. Another choice may be to adopt nonexclusionary alternatives to the solutions proposed by the Ad Hoc Committee. Alternatively, the NCAA might openly embrace the mission of providing high quality sports entertainment to the local and national community. A more serious alternative would be the implementation of ground rules in college sports, insuring the supremacy of academic values; this course would require fundamental change in the character of college sports.

B. *Choice One: Status Quo*

Neither repeal nor implementation of the new rules will insure the dominance of academic values in college sports. Thus, the impact of adhering to or abandoning the new rules is worthy of consideration.

The rules will affect certain groups differently and will not necessarily eliminate all so-called marginal students from competition. Assuming that a student meeting the rules will bring "greater" academic potential to college, the possibility of meaningful academic survival during a college athletic career may marginally increase. However, the rigors and demands of many college sports programs do not permit meaningful education. Meaningful education must be distinguished from academic survival and satisfactory academic progress. If the Ad Hoc Committee and the NCAA adhere to their 1986 implementation date, there will be no impact on the athlete capable of financing his or her own education and able to meet the minimum requirements. Impecunious high school graduates with superior athletic capabilities who

are unable to meet the standards will probably receive a first year "free ride," and thus will probably come to college irrespective of arguable scholastic deficiencies. Good—but not superior—athletes, unable to finance their first year of college education, will probably feel the impact of the new rules most. They represent the group least likely to successfully hurdle the Ad Hoc Committee's initial eligibility barrier. There is no question that the Ad Hoc Committee's initial eligibility hurdle will be higher for black high school seniors than for white high school seniors. For blacks, both the capricious record of the standardized tests to be utilized, and the ever-widening disparity between black and white incomes, will be determinative.[184] Irrespective of whether the new rules are implemented, the incentive for, and inevitability of, a sacrifice of academic values to athletic values will remain.

Such a sacrifice is inevitable because the stakes may be too high in college sports to permit the meaningful pursuit of academic values. For many individual colleges and universities the financial stake in a successful college team may be too great to ignore. A recent NCAA survey[185] indicates that by 1981, 187 NCAA Division I schools had average revenues of $3,300,000.[186] The average amount spent per school on sports was about $3,200,000.[187] The same NCAA study reports that in 1981, among these same 187 Division I institutions, average football revenues and expenses were $1,919,000 and $1,335,000, respectively.[188] The NCAA study implied an average 1981 profit among these schools of $584,000.[189] The figures for basketball programs among these same schools were less astronomical, but nonetheless striking. Revenues in 1981 averaged $445,000 while expenses averaged $329,000, an implied average profit of $116,000.[190] In 1981 fifty of these institutions showed

184. Herbers, *Income Gap Between Races Wide as in 1960, Study Finds*, N.Y. Times, July 18, 1983, at 1, cols. 2-3, and at A8, cols. 1-6. Information from the United States Census Bureau indicates that income and unemployment gaps between blacks and whites is widening dramatically. In 1960, the median black family income was $9919, while the median white family earned $17,259. By 1981, black families earned on the average $13,266, while the median income for white families was $23,517. *Id.* at A8, col. 2. In 1960, black male unemployment was 10.7%, while white male unemployment was 4.8%. In 1982, black male unemployment was 18.2%, while white male unemployment was 8.6%. *Id.* at A8, col. 3. And in 1981, 45% of black children under 18 lived in poverty level families, while only 15% of white children under 18 lived in such families. *Id.* at A8, col. 4.

185. *See* Raiborn, *supra* note 1, at 7.

186. *Id.* at 52 (Table 4.12).

187. *Id.*

188. *Id.* at 43 (Table 4.4, Average Revenues and Expenses in Football: Fiscal Years 1969-1981).

189. *Id.*

190. *Id.* at 44 (Table 4.6, Average Revenues and Expenses in Basketball: Fiscal Years 1969-1981).

average profit on athletic programs of $616,000.[191] The study forecast that in 1985, average total expenses for these Division I institutions would be $4,214,000.[192] The NCAA study estimated the NCAA's 1981 aggregate total operating expenses at $770,040,000.[193] The implementation or abandonment of the new initial eligibility rules will not change the financial incentives in college sports. If, as the Ad Hoc Committee believed, these financial incentives to win have created a climate inhospitable to academic values, minimal changes in initial eligibility rules offer little hope for different weather.[194]

The potential magnitude of economic payoffs for successful college athletes also creates a climate subversive to academic values. The new rules will do nothing to change this condition. Heisman trophy winner Herschell Walker's multimillion dollar contract is only one example in a series of high payoffs for distinguished college athletic achievers.[195] Achievement of this character requires intense devotion. Even players with no hope of matching Herschell Walker's salability must sacrifice much to remain competitive. It has been estimated that to play Division I football a player must devote a minimum of forty hours per week to the game, excluding travel time, and that basketball players must devote at least thirty-five hours a week to their sport.[196] Perpetual fatigue, frequent injuries, and performance pressure are the common lot of the college athlete.[197] Survival in big time college sports depends upon a keen edge of fitness; a lesser degree of fitness creates the risk that an athlete will be dropped from the team, as well as suffer physical injury.

Whether the new rules or the old rules apply, the status quo of college sports in America will be maintained. At least one commentator

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191. *Id.* at 42 (Table 4.2, Total Operating Profits and Deficits: Fiscal Years 1973-1981).

192. *Id.* at 28 (Table 3.8, Forecasts of Average Total Expenses: Fiscal Years 1982-1985).

193. *Id.* at 27 (Table 3.6, Estimated Aggregate Expenses: Fiscal Year 1981).

194. Crowl, *NCAA Can Prevent Abuses, Many College Chiefs Say*, Chronicle of Higher Education, Jan. 5, 1983, at 21, cols. 1-2 (86% of college presidents responding to survey said success in intercollegiate athletics makes institution's job of raising funds easier).

195. Harry Edwards and others caution that the Walkers are rare exceptions to the rule that precious few will play professional sports. According to Edwards, "those realities are hidden from potential recruits, who are dazzled with assurances of reaching the professional level. Only a few more than 100 of the 13,000 college football players eligible for the pro draft this year will actually sign on as rookies." Farrell, *A Critic Sees His Protest Against Racism in Sports Vindicated After 20 Years*, Chronicle of Higher Education, Jan. 26, 1983, at 19, col. 2. *See* Underwood, *Student-Athletes: The Sham, The Shame*, Sports Illustrated, May 19, 1980, at 37-72.

196. Farrell, *A Critic Sees His Protest Against Racism in Sports Vindicated After 20 Years*, Chronicle of Higher Education, Jan. 26, 1983 at 18, col. 3.

197. *Id.* at 18, col. 4.

concurs in the view that the new rules are largely cosmetic in impact:

> Athletics at these schools have become large business enterprises characterized by the lack of faculty control and exploitation of many student athletes . . . . The N.C.A.A. rules, instead of addressing major problems of the treatment of playing athletes and of concern about their academic futures, applies a Band-Aid approach while sweeping the real problems under the rug.[198]

This adroit summary of the status quo indicates that the score of the game will remain unchanged: Athletics 10, Academics 0.

C. *Choice Two: Nonexclusionary Reform*

Less exclusionary alternatives to the new rules have been proposed. They include: (1) Permitting the entering freshmen to demonstrate academic potential by presenting either a minimum test score or a minimum grade point average;[199] (2) dropping the use of standardized test scores from the formula altogether;[200] (3) providing a special exemption to the rule for black colleges and universities;[201] (4) lowering the minimum test score required for freshman athletic eligibility;[202] and (5) replacing the new initial eligibility rules with the NCAA olu 1.6 rule, which used a combination of factors to predict a student's chances for success.[203]

These alternatives reinforce nondiscriminatory values. They would lessen the racial impact of the SAT examination, which is at best a controversial test and at worst an inaccurate predictor of black academic potential. The less exclusionary alternatives would also stress the utilization of a variety of factors for the prediction of academic potential, and would thus emphasize access to both education and athletic opportunity rather than elimination of these opportunities. If it is true that a sizeable number of students would have no exposure to higher education but for college sports programs, access-oriented solutions to the problem of academic integrity in sports may also serve academic objectives. Moreover, these nonexclusionary solutions are also attractive because they present the potential for a racially harmonious "solution" to the academic integrity problem.

These solutions, however, would not significantly favor academic values over athletic ones. If adopted, they would certainly broaden ac-

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198. Farrell, *2 Civil-Rights Leaders Denounce NCAA's New Academic Standards*, Chronicle of Higher Education, Jan. 26, 1983, at 18, cols. 2-3.

199. Vance, *Testing-Service Head Hits NCAA's Academic Rules*, Chronicle of Higher Education, Feb. 2, 1983, at 18, col. 1.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

cess to college sports programs, but would not necessarily contribute to the student-athlete's attainment of a meaningful college education. Rather, these access-oriented minimum standards would provide more access to college sports in its current form: a time-consuming, all encompassing endeavor, the virtual equivalent of a full-time job, with physical and emotional hazards few people would face without extraordinary compensation or extended job security.[204] Access-oriented reform, without more, will not achieve academic integrity in college athletics.

D. *Choice Three: "SPORTS FOR SALE!"*

A recent *Chronicle of Higher Education* survey asked Division I college presidents whether academic abuses in athletics might be eliminated by turning football and basketball programs into professional teams.[205] Eighty-two percent disagreed with that solution,[206] but the magnitude of the negative response should not be surprising. To embrace such a drastic solution would be to embarrassingly acknowledge what is fast becoming fact: athletics is big business, and the financial awards will soon become even greater as a result of increasingly lucrative television and cable contracts.[207]

The Ad Hoc Committee and the NCAA hope to intervene before the facts of sports life become inconsistent with academic life. They hope to rededicate colleges, universities, and indeed America to the fundamental policy stated in the NCAA Constitution that "intercollegiate athletics . . . retain a clear line of demarcation between college athletics and professional sports."[208] If major reform in college sports is not forthcoming, certain college teams will become de facto professional teams, constituting a farm team system for de jure professional teams. If the NCAA is unwilling to pursue significant reform of college sports, it can openly abandon the distinction mandated by its Constitution. The NCAA can openly declare "SPORTS FOR SALE."

Such an open avowal of the professional nature of college sports

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204. Some of Harry Edward's proposals address these concerns. *See* Farrell, *A Critic Sees His Protest Against Racism in Sports Vindicated After 20 Years*, Chronicle of Higher Education, Jan. 26, 1983, at 19, cols. 1-2 (describing and advocating an athlete's bill of rights with economic, health, and educational safeguards).

205. Crowl, *NCAA Can Prevent Abuses, Many College Chiefs Say*, Chronicle of Higher Education, Jan. 5, 1983, at 21, cols. 1-2.

206. *Id.*

207. The district court in Board of Regents of the Univ. of Okla. v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276 (W.D. Okla. 1982), *aff'd in part, rev'd in part*, 707 F.2d 1147 (10th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3303 (U.S. Oct. 18, 1983) (No. 83-271), found that the NCAA television contracts will indeed be quite lucrative. In 1983, they would produce $64,000,000, in 1984, $68,500,000, and in 1985, $72,000,000. *Id.* at 1290.

208. *See* NCAA Constitution art. II, § 2, NCAA MANUAL, *supra* note 1, at 7-8.

could have interesting results. The question of compensation for athletes, not only for current value received but for future risks incurred, would certainly be a legitimate topic. Also, it might be appropriate to discuss whether colleges and universities might share in the profits they create for professional teams in return for undertaking the professional education of potential de jure professional athletes. The contribution of colleges and universities to the professional sports education of potential de jure professional athletes is not diminished by recent statistics showing how few college athletes are actually signed by professional teams. According to those statistics, about 100 of the 13,000 college football players eligible for the football draft will sign on as rookies, and of the 5,900 college basketball players eligible for the draft, fewer than 60 will be signed.[209] However, the creation of such an experienced pool of potential professionals represents an enormous undertaking of tremendous value. The benefits of college sports competition need not be diminished to acknowledge the contribution of colleges and universities to the lucrative professional sports business.

A well-designed scheme for compensating college athletes and returning the investment in professional sports education would have both benefits and detriments. It would represent a more honest, perhaps less hypocritical, approach to an apparent athletic hegemony. It might be more fair to, and protective of, the student-athlete, and would certainly be more lucrative for the university. Its detriment lies in its capitulation to the creeping professionalization of college sports, and in its open commitment of the university to athletics as a top priority.

E. *Choice Four: Academic Integrity*

The well-worn cliche about the barn door is applicable to the new rules. The efforts of the Ad Hoc Committee and the NCAA seem to have been well-meant and legitimate, but they were, by analogy, similar to closing a door after the horse has run free. The Constitution of the NCAA still affirms its commitment to the distinction between professional sports and intercollegiate sports. Indeed, there is a distinction insofar as college teams and professional teams do not compete against each other. But the line between professional competition and collegiate competition is being increasingly blurred by the quality and level of collegiate competition, and the relationship between the NCAA and professional competition with its commercial appeal. As to sports such as basketball and football, it is too late to seek a system that might permit academic ideals to hold sway. College competition in these sports has been transformed from a friendly diversion for young adults to an extensive and lucrative preoccupation of our nation. The reality is

209. Farrell, *A Critic Sees His Protest Against Racism in Sports Vindicated After 20 Years*, Chronicle of Higher Education, Jan. 26, 1983, at 19, col. 2.

that America's colleges and universities are providing a rather expensive form of entertainment to the American people.

This expense assumes various forms. There is expense due to the diversion of academic resources to athletic activities. There is expense due to the subsidization of quasi-farm teams for professional leagues. There is also incalculable expense to our integrity and the integrity of our institutions when our leaders in higher education participate in a system that so systematically denigrates the academic ideal. The greatest expense lies in the diversion of talented young people to athletic activity rather than academic pursuits.

Unless the rules of the game are fundamentally changed, academic values cannot hope to win in a contest against athletic values. The Ad Hoc Committee, the NCAA, and many others have long been aware of the increasing contradiction between academic values and athletic values. No one doubts that meaningful change is required to restore academic integrity in intercollegiate sports. But it is relatively painless and uncontroversial to change the characteristics of the athletes who play, as long as the game goes on. It would be much more painful—even heretical—to suggest that the game be stopped.

Recently, the University of San Francisco embraced the heretical course. Caught up inextricably in an increasingly embarrassing and entangling web of scandal, it abandoned its nationally ranked basketball program.[210] However, less than one year later, the University decided to reinstate basketball under new guidelines designed to "lessen the temptation for some overzealous individuals to engage in the kinds of abuses that prompted [it] to discontinue [its] program."[211] Throughout its difficult experience, the University has emphasized its commitment to academic values as a necessary aspect of the athletic experience. It is too early to know whether these values will be effectively promoted within the confines of the "new" athletic regime. The Reverend John Lo Schiavo, president of the University of San Fransisco, candidly admits that college athletics "is an intensely competitive industry in America . . . . The real question is, 'Can an athletic program based on the right principles survive and thrive in this stressful environment?' "[212] He answers, "I think so."[213] His hopes are clear, and his fears close by.

The approach of the University of San Francisco and the NCAA evidence a desire to maintain college athletics "as we know it," while eliminating the evils that they generate. The approach is admirable but

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210. *A Big Basketball Power Drops the Sport, Blaming Abuses by Alumni "Boosters"*, Chronicle of Higher Education, Aug. 11, 1982, at 1, col. 2.

211. Lo Schiavo, *Restoring and Controlling, a College Sport*, N.Y. Times, July 10, 1983, at 2S, col. 5.

212. *Id.*

213. *Id.*

quixotic. It is admirable because it may be fueled by a genuine hope that the end of victory will not dictate the means of academic corruption, and because important elements of the athletic experience are unique and do enrich.[214] But it may be quixotic due to the salient characteristics of the game "as we know it"—ecstatic, lucrative, and, all too often, completely consuming.

Can we have our athletes and educate them too? Money as well as minds depend on our answer.

V. CONCLUSION

This article has reviewed the process leading to the NCAA's formulation and adoption of the new initial eligibility rules, as well as the legal and policy issues raised by the rules. The rules were formulated to enhance the academic integrity of intercollegiate athletic programs nationwide, but whether they will accomplish this result is questionable. It seems clear that they will exclude a disproportionate percentage of black athletes without significantly enhancing the academic experience of all college athletes. Equal protection-based and association law-based challenges to the rules will probably not fair well if current judicial trends are followed. However, a more reasonable and aggressive judicial approach might send the NCAA back to the chalk room to reconsider their game plan for academic integrity. At most, a more aggressive stance would guarantee the nonexclusionary reform of intercollegiate athletics. This is an important result given the importance of educational access to black youths.

True reform that maximizes academic hegemony will not come from the courts. Rather, the NCAA or its constituent institutions must choose policies and implement rules that permit us to have our athletes and educate them too. This result is only possible if we change the nature of the game to permit the maximization of educational values.[215] In the short run, it is not likely that choice will be made. But in

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214. *See supra* note 166.

215. On September 8, 1983, Derek Bok circulated to college presidents a new proposal "to preserve and promote proper academic standards, adequate concern for the educational needs of student athletes, and other important institutional interests." Letter from Derek Bok, President of Harvard University and Chairman of the Ad Hoc Committee, to College Presidents, at 1 (Sept. 8, 1983). In the letter, he reported that the Ad Hoc Committee "tentatively concluded that these goals can be best achieved through the creation of a Board of Presidents within the NCAA structure." *Id.* According to Bok, the Board would be broadly representative, and would "possess the ultimate power to establish rules and policies on important matters affecting academic values . . . ." *Id.* The most important sections of the proposal govern the jurisdiction, functions, and power of the proposed board. Appendix to Letter from Derek Bok, President of Harvard University and Chairman of the Ad Hoc Committee, to College Presidents, at 7-8 (Sept. 8, 1983). Paragraphs six and seven of the Appendix state:

6. The Board's authority would extend to issues bearing significantly

the long run, it is our only serious option.

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on the educational or financial interests of the member universities, or on their institutional integrity and reputation. (The Board would *not* function as an appellate body to hear complaints from individual institutions. Nor would the Board concern itself with routine personnel decisions or with the many programs and other matters dealt with by the NCAA that have purely athletic significance without effecting important institutional interests.) The Board itself would be the final judge of whether an issue lay within its proper purview. (The presidents serving on the Board would seem to be the best judges of which matters affected the educational, financial, or ethical interests of member institutions. The heavy demands on the time of chief executives make it unlikely that the Board would expand the scope of its authority inappropriately.)

7. Within the scope of its authority, the Board would have the following functions and powers.

a. To advise the NCAA Council and staff on matters affecting the interests of its member institutions and to suggest ways by which these interests could be protected and enhanced.

b. To suggest studies designed either to ascertain the effects of athletics on member institutions, especially on their academic standards and programs, or to explore ways of alleviating recognized problems and abuses.

c. When advice and consultation prove unavailing, to promulgate rules (either by instituting new rules or by amending or voiding existing rules) to the extent needed to safeguard important educational, financial, or ethical interests of the member institutions. In exercising these powers, except when circumstances clearly require rapid action, the Board should extend an ample opportunity to the NCAA Council and staff to offer their opinions and present the views of their members. Specifically, whenever the Board proposes to enact new rules or to amend or repeal established rules, it should first submit its proposals to the Council and should allow at least six months for the Council to submit its comments on the basis of such discussion and consultation as the Council may deem appropriate. In the event of new rules or amendments passed by the convention, the Board may act promptly to suspend the implementation of the new rule or amendment, but the Board should then wait not less than six months nor more than one year to take a final vote expressing its approval or disapproval.

d. To approve the appointment of any new Executive Director nominated by the Executive Committee of the Council and to present in confidence to the Executive Committee at approprite intervals its evaluation of the performance of the Director and staff in carrying out policies and practices relevant to matters within the purview of the Board.

Id. In essence, the proposal seeks a renewed legitimacy of the academy through an implicit reaffirmation of values, reinforced by structural reform of the NCAA. Significantly, the proposals and accompaniments do not restate or revise the objectives of the NCAA or intercollegiate athletic programs. Rather, the proposal embodies a revisionary potential, to be exercised when cooperative measures fail to achieve its stated goals.